No. 701.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1922.

THE BOARD OF TRADE OF THE CITY OF CHICAGO, et al.,
Appellants.

vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANTS.

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SUBJECT INDEX.

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STATEMENT.

The sole question on this appeal is the constitutionality of the Act of Congress entitled "The Grain Futures Act," recently enacted in lieu of "The Future Trading Act," which was in its principal features adjudged by this court to be unconstitutional in *Hill* v. *Wallace*.

A bill seeking to restrain enforcement of this later act (which is printed at the end of this brief) because unconstitutional was filed in the District Court by the Chicago Board of Trade and seven of its members (the latter suing on behalf of all members) against the United States District Attorney and Postmaster at Chicago, and

the Secretary of Agriculture. All the defendants answered denying some of the averments of the bill.

Upon the hearing of a motion for a temporary injunction the District Judge denied the injunction, and on his own motion dismissed the bill for want of equity. From that decree this appeal was perfected.

The title of the later act is, "An Act For the prevention and removal of obstructions and burdens upon interstate commerce in grain, by regulating transactions on grain future exchanges, and for other purposes." The title of the former act was, "An Act Taxing contracts for the sale of grain for future delivery, and options for such contracts, and providing for the regulation of boards of trade and for other purposes."

The former act contained certain provisions which attempted to bring under the control of the Secretary of Agriculture all grain exchanges, whereon occurred trading in grain for future delivery. These regulatory provisions were by this court in *Hill* v. *Wallace* held unconstitutional.

The present act re-enacts verbatim these regulatory provisions, which are sufficiently described in the opinion in *Hill* v. *Wallace*, as follows:

> "Section 5 authorizes the Secretary of Agriculture to designate boards of trade as contract markets when and only when such boards comply with certain conditions and requirements, as follows:
>
> (a) When located at a terminal market where cash grain is sold in sufficient amount and under such conditions as to reflect the value of the grain in its different grades, and where there is recognized official weighing and inspection service.
>
> (b) When the governing body of the board adopts rules and enforces them, requiring its members to make and keep the memorandum of all transactions in grain, whether cash or for future delivery, as directed by the Secretary.

(c) When the governing body prevents the dissemination by the board or any member thereof of false, misleading, or inaccurate report, concerning crop or market information or conditions that affect or tend to affect the price of commodities.

(d) When the governing board provides for the prevention of manipulation of prices, or the cornering of any grain by the dealers or operators upon such board.

(e) When the governing body admits to membership on the board and all its privileges any authorized representative of any lawfully formed and conducted co-operative associations of producers having adequate financial responsibility:

'Provided, that no rule of the contract market against rebating commissions shall apply to the distribution of earnings among bona fide members of any such associations.'

(f) When the governing body of the board shall make effective the orders and decisions of the commission appointed under section 6.

Section 6 provides that any board of trade desiring to be designated as a contract market shall apply to the Secretary of Agriculture, with a showing that it complies with the conditions already stipulated in section 5 and a sufficient assurance of future compliance. The section appoints a commission of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General, who may, after due notice to the officers of the board, suspend for six months or revoke the designation of any board as a contract market upon a showing of failure to comply with the requirements of section 5.

Provisions are made for an appeal from this order to the Circuit Court of Appeals, and appeal is granted to the commission from the refusal of the Secretary of Agriculture, upon application, to designate any board as a contract market.

Section 6 also provides that if the Secretary of Agriculture has reason to believe that any person is violating any provisions of the Act or is attempting to manipulate the market price of grain in violation of the provisions of section 5, or any of the rules or regulations made pursuant to its requirements, he may have served upon such persons a complaint for

a hearing before a referee, to take evidence, to be transmitted to the Secretary as chairman of the commission, and the commission may, after a finding of guilt, issue an order requiring all contract markets to refuse such person trade or privileges. This order may be revised in the Circuit Court of Appeals."

The enforcing provisions of the two acts differ. The earlier act imposed a prohibitive tax of twenty cents per bushel on every contract for the future delivery of grain, *except* (1) when made by the owner or grower of grain, or the owner or renter of land upon which it is grown, or associations of such persons, or (2) when such contract was made by or through a member of an exchange qualifying as a "contract market," and the failure of a seller to pay such tax was made punishable by a heavy fine or imprisonment.

The enforcing provisions of the later act contain the same exemption of owners or growers, etc., of grain, as did the earlier act. They also impose the same fine or imprisonment on any person, who delivers for transmission through the mails, or by interstate telegram or telephone, any offer to make, or any confirmation of the execution of, or any quotation or report of the price of, any contract of sale for future delivery on, or subject to the rules of, any board of trade. They also subject to like punishment any person making any such contract of sale, which is or *may be* used as a hedge, or for determining the price basis of any transaction in interstate commerce, or for delivery of grain in interstate commerce, EXCEPT when made by or through a member of a "contract market." While the wording here is more elaborate than in the former act, the two acts in effect are in this respect the same; as the later act so deters persons from resorting to the exchange as to make it impossible for the exchange without becoming a "contract market" to perform its important function of providing a market for future

trading. In short, both acts adopt the same method to compel the exchange to submit to federal control—by penalizing those who participate in its future trading, if the exchange does not thus submit. A minor difference is that the later act professes to be an exercise of the power of Congress over interstate communication.

Thus the difference between the two acts may be summarized by saying that the later act is the earlier act with the enforcing feature somewhat changed, and plus section 3, which reads as follows:

> "Sec. 3. Transactions in grain involving the sale thereof for future delivery as commonly conducted on boards of trade and known as 'futures' are affected with a national public interest; that such transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling grain and the products and by-products thereof in interstate commerce; that the prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of grain and the products and by-products thereof and to facilitate the movements thereof in interstate commerce; that such transactions are utilized by shippers, dealers, millers, and others engaged in handling grain and the products and by-products thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price; that the transactions and prices of grain on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling grain and products and by-products thereof in interstate commerce, and that such fluctuations in prices are an obstruction to and a burden upon interstate commerce in grain and the products and by-products thereof and render regulation imperative for the protection of such commerce and the national public interest therein."

As section 3 is only argumentative in character and does not command anyone to do anything, it is apparent that each act has the same object—the regulation of the exchanges where future trading occurs—and as respects the question here for decision, *the directory provisions in the two acts are the same not only in substance, but in language.*

As the bill was dismissed for want of equity, its allegations present the facts, which are as follows:

The Chicago Board of Trade is a corporation created in 1859 by a special charter from the State of Illinois (Rec., 21), with power (1) to admit such persons as members, and expel such persons *as it shall see fit;* (2) to maintain such by-laws as it may think proper for the government of the corporation and for the management of the business of its members and the mode in which it shall be transacted; (3) to appoint committees of arbitration for the settlement of differences submitted by members or others,—the award in any such arbitration, when filed in the Circuit Court, becoming a judgment, upon which execution may issue; (4) to appoint persons to examine, measure, weigh, gauge, or inspect flour and grain—the certificate of such appointees as to the quantity or quality being made evidence between buyers and sellers assenting to their employment.

Its rules (Rec., 23) also vest the government of the Board in its board of directors, authorize such directors to determine what persons are of sufficiently good character and credit to be admitted to membership, and provide that each such applicant shall pay an initiation fee of $25,000 or present an unimpaired membership to be transferred, and shall sign an agreement to abide by its rules and by-laws. These rules also provide for the suspension or expulsion of any member guilty of certain other offenses.

The Board itself transacts no business and pays no dividends. Its chief function is to provide an exchange room, where its members may meet daily between certain market hours and make with each other contracts for the purchase of grain and other products of the farm. It also prescribes rules respecting its members' contracts, and enforces them by disciplinary proceedings, when necessary; it also maintains and enforces rules for the settlement of any disputes arising out of members' contracts; and it displays in its exchange hall all available statistical and other news concerning crops, etc.; and about its only other function is to determine who are fit persons, as respects character and financial responsibility, to be and remain its members.

In recent years in most of the grain-producing states many so-called farmers' co-operative associations have been organized with the avowed purpose of enabling farmers, who become members, to market their crop at actual cost and without paying any commissions to members of the exchanges. Their plan is to have a salaried officer of the co-operative organization elected a member of the exchange, and through him to sell all the grain of the members of this organization—he temporarily charging the prescribed commissions and ultimately rebating back to such members the aggregate of such commissions (after paying his salary and incidental expenses) on the basis of the number of bushels of grain each farmer shall have sold through the organization—such rebates being commonly called "patronage dividends."

In the past members of these co-operative associations have been refused admission to membership in this Board because their avowed purpose was to violate one of its rules prescribing the rates of commissions to be charged by members when acting as agents, and this would destroy the business of those of its members who receive

grain on consignment for sale; and the bill avers that the ultimate effect would be to much impair, if not destroy, the value of all memberships, and make it difficult for the Board to retain sufficient members to pay the assessments necessary to maintain the exchange.

Members of this Board engage only in the following kinds of trading in grain:

1. Some members receive from producers or country grain dealers grain to sell on commission and pay to their principals the proceeds less their commissions; and members also, either as agents or principals, buy and sell grain for immediate delivery in Chicago. Such transactions are known as "cash" transactions, and by the terms of The Grain Futures Act they are excluded from its provisions.

2. Some members of the Board send letters or telegrams at the end of each day to country points offering to purchase grain. When accepted these become contracts for the purchase of grain upon the condition that the grain is "to arrive" in Chicago within a certain time. (This kind of trading was involved in *Chicago Board of Trade* v. *United States*, 246 U. S. 231.) Other members in like manner make contracts for the *sale* of grain to be shipped from Chicago to milling or exporting points within a certain time. While, strictly speaking, all these are contracts for future delivery, they are expressly excluded from the provisions of The Grain Futures Act by being denominated therein as "cash sales for deferred shipment or delivery." Moreover, contracts of these two kinds are not strictly Exchange transactions, because the offers are generally sent from, and the acceptances are generally received at, the offices of the individual members. The contracts do not result from, or in, any trading on the Exchange itself.

3. Many members daily engage, either as principals or agents, in the making in the exchange room of contracts with other members for the purchase and sale of grain for delivery during a certain named future month. Such contracts relate almost wholly to wheat, corn and oats, and the volume of such trading is so large that the Board has set aside in its exchange room for such trading three separate spaces, commonly known as "pits," where many of its members daily gather and by open *viva voce* bidding make these contracts for future delivery. The rules of the Board require that all orders received by members to buy or sell for future delivery shall be executed in the open market in the exchange room during the prescribed market hours (9:30 a. m. to 1:15 p. m.) In all such contracts the buyers and sellers are personally present in Chicago, and any offer by a member becomes a contract with the member who first accepts the offer.

The bill sets out in detail the characteristics of such contracts. (Rec., 9.) The only grain that can be, or is contemplated to be, delivered on these contracts is grain that has already lost whatever interstate character it may have possessed.

Approximately six-sevenths of all the trading in grain for future delivery upon the exchanges in this country takes place on the Chicago Board of Trade.

The individual appellants in the present case brought a suit to have The Future Trading Act adjudged unconstitutional, because within neither the taxing, nor interstate commerce, power of Congress, their bill containing practically all the foregoing allegations of the present bill. The Solicitor General inserted in his brief in this court the speech in the Senate of the acting chairman of the Senate Committee on Agriculture, which stated the reasons of such committee why that bill should become The Future Trading Act. A reference to these reasons—

which are set out in the present bill (Rec., 15)—will show that they are practically the same reasons, which are recited in section 3 of the later act.

This court, in *Hill* v. *Wallace*, held the former act unconstitutional because not within the interstate commerce, or taxing, power of Congress, and on its mandate a final decree was entered in the District Court against appellee Clyne, et al., adjudging sections 4, 5, 6, 7, 8 and 10 of The Future Trading Act to be in violation of the Constitution, and permanently enjoining said Clyne from attempting to enforce the said act. The present bill claims that the defendants in the present suit are, by reason of said decree and the facts above stated, estopped to assert that such future trading is interstate commerce, or that Congress under its commerce power could lawfully enact sections 4, 5, 6, 7, 8 and 9 of The Grain Futures Act.

In denial of the recitals of section 3 of "The Grain Futures Act," the bill alleges that no corners have for the last fifteen years occurred in future trading in grain on the Chicago Board or the other exchanges, that such future trading has never been successfully resorted to for the purpose of manipulating or controlling, and thereby depressing, the prices of grain, that such selling for future delivery does not result in causing the prices of grain to be abnormally depressed; that neither such transactions for future delivery nor the prices therein are susceptible to manipulation or control, and that sudden or unreasonable fluctuations in the prices of grain do not frequently occur as the result of speculation or manipulation or control of prices, or transactions in said future trading; that such fluctuations as do occur in such prices are not detrimental to the producer or consumer, or the persons handling grain in interstate commerce; that on the contrary such future trading has materially

stabilized prices and caused fluctuations therein to become less sudden and less violent than they were before such trading became a practice on such exchanges; and that neither such future trading nor such fluctuations in prices of grain as do occur therein are an obstruction to, or burden upon, interstate commerce in grain. More than twenty affidavits of professors of Political Economy in our leading universities supporting these allegations were filed in support of the motion for an injunction. (Rec., 42-71.)

The bill recites the several grounds upon which The Grain Futures Act is claimed to be unconstitutional, and contains a prayer that it be so adjudged and that the present appellees be enjoined from enforcing it.

ERRORS RELIED UPON.

That the District Court erred:

1. In not holding that The Grain Futures Act and The Future Trading Act are essentially the same, and the decision of this court in *Hill* v. *Wallace* is controlling.

2. In not holding that The Grain Futures Act violates the Constitution of the United States in that thereby Congress attempts to regulate commerce which is wholly intrastate in character.

3. In not holding that The Grain Futures Act interferes with the legislative discretion of the states respecting their intrastate commerce, in violation of the Tenth Amendment of the Constitution.

4. In not holding that said Act is not within the power conferred on Congress to establish postoffices.

5. In not holding that Section 6 of the Act violates the due process of law provision of the Constitution in so far as it attempts to create a crime and to confer on

a commission composed of officials appointed by, and holding office at the will of, the President, judicial power to try and punish such crime, and that in so doing it fails to sufficiently define such crime.

6. In not holding the provision of the Act (Section 5 (e)), which requires the exchanges to admit to membership representatives of farmers' co-operative associations, and to permit "patronage dividends," violates the Federal Constitution in that it deprives the Exchange, as well as its individual members, of their property without due process of law.

7. In entering a decree dismissing the bill for want of equity, instead of granting a temporary injunction and proceeding to a hearing and decree adjudging said Grain Futures Act unconstitutional in the particulars above stated, and *in toto*.

Point I.

THIS CASE SHOULD BE REVERSED WITH DIRECTIONS FOR A DECREE FOR APPELLANTS UPON THE AUTHORITY OF *Hill* v. *Wallace*.

Congress seems to have passed the present act under a misapprehension as to the scope of the decision in *Hill* v. *Wallace*. Immediately following that decision the Secretary of Agriculture caused to be drafted a new bill for this later act. In explaining the bill to the House Committee on Agriculture, the Assistant to the Secretary stated (See Hearings before the Committee on Agriculture, House of Representatives, Series CC, p. 2) that, as there was no language in the act showing the intention to exercise some other power, this court had annulled the former act "just because it was under the taxing power." And in the committee's favorable report it was stated that this court had held section 4 of the former act "to be

unconstitutional in that that law attempted to regulate the exchanges by the taxing system." (67th Congress, 2nd Session, House Report No. 1095.) The favorable report of the Senate Committee on Agriculture also stated that this court had annulled The Future Trading Act because it was "based solely upon the taxing power of the Constitution." (67th Congress 2nd Session Senate Report No. 871.)

Hill v. *Wallace* will not bear the construction thus placed upon it. The earlier act by its title was an act "for the regulation of boards of trade," as well as for taxing future contracts. Under a principle frequently announced by this court it was incumbent upon it to sustain the act, if this could be done upon any ground and this regardless of the title of the act. The exaction of the payment of 20 cents a bushel—though condemned as a tax—would have been upheld by this court as a penalty, if it had thought the act a valid exercise of the commerce power. The form of a penalty to enforce a law is exclusively within the legislative discretion.

In this view appellants' counsel in brief and argument attacked that law upon the ground that it was neither within the commerce, nor the taxing power, of Congress, and the opinion of this court squarely met this issue when, after deciding the act not to be within the taxing power, it said: "We come to the question then, Can these regulations of boards of trade by Congress be sustained under the commerce clause of the Constitution? Such regulations are held to be within the police powers of the State." And thereafter, this court directed an injunction to prevent a compliance with identically the same provisions, which constitute the directory legislation of this later act.

While the opinion does contain language limiting the

decision so as not to debar Congress from enacting other proper legislation confined to interstate commerce, and designed to remove obstructions upon that commerce, it does not seem to warrant the assumption—which Congress seems to have indulged in—that the annulled law might be re-enacted, if Congress would incorporate in the new act its reasons for passing such a statute.

This is the more apparent from the fact that the new act (section 3) presents no reasons that were not before this court on the former hearing.

This court has held that, while the speeches of individual members of Congress may not be resorted to, the reports of the committees and the speeches of their chairmen, which explain bills and give the reasons for their passage, may properly be considered by this court. (*Duplex Co.* v. *Deering*, 254 U. S. 475.)

Under this rule the Solicitor General printed in his brief the speech of Senator Capper, the acting chairman of the Senate Committee on Agriculture, and father of both laws, giving the reasons of his committee for the passage of the earlier act. By reference to the extracts from that speech, which have been incorporated into the present record (p. 15) it will be seen that the committee recommended the passage of The Future Trading Act and its regulation of future trading on the grain exchanges "because of its arbitrary interference with economic laws and its disturbance of the balance that demand and supply of commodities when left to itself brings about," and because it "distorts true demand and supply and creates a false price;" and "violent and unnatural fluctuations;" and because "the evils in the marketing system which this bill undertakes to correct are: (a) Market manipulation by large operators. * * * (e) Arbitrary interference with the law of supply and demand." The senator also asserted that the speculators

"wrecked the true market, depressed the value of the producer's property, and the big speculators and exporters bought wheat cheaper and cheaper;" and "that through manipulation of the market the big speculators on the Chicago Board of Trade are undoubtedly a powerful factor in fixing the price of the farmer's wheat;" and the senator cited many statements by persons appearing before the committee, which were thought by the committee to sustain the foregoing charges.

The foregoing are substantially the same allegations as have been incorporated into section 3 of the present act with a view of having this court sustain the practical re-enactment of the old law.

How, then, is the case as now presented different from the case presented by *Hill* v. *Wallace?* The provisions of the law, which are material here, are the same. The reasons of Congress for their enactment are the same, and in both cases are brought to the attention of this court.

If there is a distinction broad enough to escape the effect of the former decision, it must lie in the fact that the reasons of Congress are now recited in the act, while in the former case this court had them from the records of Congress. Such a distinction must rest either on the ground that the recitals in a statute of the reasons of Congress for passing it become conclusive upon the court, when it is passing upon the constitutionality of the act, or that this court can fully appraise the reasons of Congress only when they are incorporated into the act.

The bill sets up the proceedings in *Hill* v. *Wallace,* including the decree entered on the mandate of this court and adjudging unconstitutional the same regulatory or directory provisions, which reappear in the later act; and as the former suit and present one are practically

between the same parties, these proceedings are pleaded as an estoppel against the assertion in this case of the validity of these provisions.

We do not stop to consider whether the technical doctrine of estoppel is here applicable; nor whether the doctrine of *stare decisis* is applicable to constitutional questions, because in any event *Hill* v. *Wallace* must, so far as applicable, control the decision of this case, unless this court shall conclude—what we may not assume—that it made a mistake in that case, and should now recede from that decision.

Point II.

Future trading on the exchanges does not impose a burden upon interstate commerce.

This proposition constitutes the key of the arch upon which this law rests. Without it the act clearly falls within the decision in *Hill* v. *Wallace*. Indeed the Secretary of Agriculture told the Senate that the declaration in section 3 that future trading is a burden upon interstate commerce "seems to be necessary to meet the requirements of that decision." (67th Congress, 2nd Session, Senate Report, No. 871.)

The recitals of section 3 are not conclusive of this question. Doubtless recitals in an act of the reasons for its enactment are entitled to consideration, especially when they are in harmony with what is common knowledge, or what the court itself knows. (*Block* v. *Hirsh*, 256 U. S. 135, 150.)

But when the existence of constitutional power depends on a certain fact or condition, this court must for itself determine whether that fact or condition really exists; otherwise this court would yield to Congress its right and duty to decide upon the constitutionality of an act, and

a mere legislative fiat would be conclusive upon this court. As stated by the Court of Appeals, in passing on the constitutionality of a statute, in

Matter of Jacobs, 98 N. Y. 110:

> "It matters not that the legislature may in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law."

This is also true of a declaration in a condemnation statute that the contemplated use is a public one. (*Hairston* v. *Danville*, 208 U. S. 598, 606.)

Indeed, the same principle is recognized by this court in *Hill* v. *Wallace*, and in the *Child Labor case*, wherein recitals in the titles of those acts that the purpose was to tax were treated by this court as mere pretexts.

As stated by the late Chief Justice White, when as senator he was discussing the Hatch Anti-Option bill:

> "My mind can draw no line of distinction between the false declaration of the exercise of the taxing power and the false declaration of impediment to commerce made for the purpose of vesting a jurisdiction in the Federal Government which it lawfully has not. * * * If this right by declaration obtains to bring every act under the interstate-commerce clause, all the inherent limitations in our Government will be destroyed and every vestige of local autonomy will be gone." (24 Cong. Rec., 930.)

How then is the existence of this essential fact or condition to be ascertained—by the usual legal method of allegation and proof, or by such knowledge as this court is presumed to have?

If the former, then upon this record such obstacle or burden to interstate commerce does not exist; for the bill so alleges, and the case is here as upon a demurrer to

the bill sustained for want of equity; and the case should be reversed and remanded for proof on this question, if appellees, who in their answer have denied this averment, shall so desire.

But as after all this is a question of economic or trade law, which must be resolved more as a matter of expert opinion than by direct proof, it would seem to be a question, which this court could decide upon its own present knowledge of the subject, supplemented by such resort to the writings of trained minds as it shall find necessary.

In that view we have gathered in an Appendix to this brief (separately printed for convenience) extracts from the report of the United States Industrial Commission, from the records of the English Parliament, and from leading writers on Political Economy, in the belief that this would furnish this court more ready access to the literature on that subject.

This record also contains (pp. 42, 44) two price-charts, prepared by Dr. Boyle, Professor of Political Economy in Cornell University, showing prices of cash wheat at Chicago over a long period of time, and the affidavits of twenty-two professors of Political Economy in our leading universities expressing their views upon the recitals in section 3, which would also seem to provide—as would the writings of such persons—a proper source of information for this court.

Starting then with the proposition that the price-fluctuations under consideration are such as are created in sales for future delivery on an exchange, which "are not in and of themselves interstate commerce," such prejudicial effect, if any, as these fluctuations may have upon this future trading—which is purely intrastate commerce—or those participating in it must be put to one side.

Our inquiry is to be confined to the effect of these future

price-fluctuations on such cash sales—including sales "of cash grain for deferred shipment or delivery"—*as are interstate commerce.*

We should here start with a clear conception that the prices in these *future* sales do not *fix or determine* the prices in *cash* sales in either intrastate or interstate commerce. The cash price and the future price in the same market will never—or at least only by a rare chance—be the same, except in the delivery month of the future contract when further trading for delivery in that month usually ceases except for the closing of existing contracts.

The cost of carrying the grain from the present time to the future delivery date constitutes one normal element of difference between the "cash" price and the price in the futures. So when the future sales contemplate delivery in a month of the next crop year the cash and future prices have no fixed relation to each other because dependent upon different supply conditions.

True, the cash prices will not continue below the level determined by a deduction from the future price equal to the normal cost of carrying the actual grain until the delivery month; for whenever cash wheat thus falls speculators quickly take advantage of it by buying the cash and selling the future.

But the cash price may be, and frequently is, relatively higher than the future price because of some urgent immediate demand of millers or exporters or other reason. (See p. 87 of this brief.)

So too, there is nothing to *compel* those, who make interstate sales or purchases of grain, to accept as their price the future price or any fixed departure from it. Two persons engage in a cash transaction in grain only when both minds agree upon what the price should be,

and this occurs only when each is satisfied to join in a trade at that price. It is, in other words, a price voluntarily arrived at. What is true of an individual sale is equally true of all the sales which go to make up interstate commerce.

Doubtless the quotations of prices in future trading constitute a part, and often an important part, of the *information upon which the minds of seller and buyer act* in agreeing upon their price. That these quotations of future prices do not correctly and precisely speak the prices in the future trading no one contends. But the shipper of grain across state lines will be more influenced by the prices of "cash" grain in his accessible markets, which are seldom actually, and often not relatively, the same as the future prices.

Thus the position of Congress must be, that the future prices in purely *intrastate* commerce may, and as respects grain at times do, so directly, materially and prejudicially affect cash prices in *interstate* commerce as to become, within the meaning of the Constitution, an obstacle thereto, and burden thereon, which Congress may remove. More upon this later. We are here concerned only in developing the scope of the question.

We must first ascertain the test or standard by which to determine, whether these price fluctuations in intrastate commerce are a burden upon interstate commerce. Nothing may be regarded as a burden upon commerce, which does not prejudicially affect those engaged in it or the public generally. If this country exported *all* the grains that it raises, it might be said that whatever tends to raise the price is beneficial rather than hurtful, and only such conduct or influences as tended to depress prices should be regarded as a burden upon commerce. But this country consumes the major part of its own grains, and this court has determined in *U. S.* v. *Patten,* 226 U. S.

525, that a conspiracy of persons to run a "corner" and thereby *increase* prices is so harmful to the public as to be within the Sherman Anti-Trust Act.

Hence, *what the law contemplates is the free and unrestricted play of the natural law of supply and demand.* Only such conduct or influences, therefore, as cause prices in interstate commerce to be other than such as would result from this natural law, are to be here considered in ascertaining what are burdens upon that commerce.

This burden may arise either because such prices are raised above, or depressed below, the normal price. The former could result—if at all—only from the excessive buying of speculators who aim to "corner" the markets and thereby force short sellers to settle at a price above the natural price. But "corners" in the grain market are "a thing of the past." (Appendix, p. 33.) The amount of capital and credit required, the probability of failure and consequent enormous losses, rules of the Exchange prohibiting and penalizing "corners," and the decision of this court in *U. S.* v. *Patten*, 226 U. S. 525, have caused "corners" to be found only in past history.

The bill avers (Rec., 13) that no "corners" have for the last fifteen years occurred in the future trading in grain on any of these exchanges. The truth of this averment, as respects Chicago, will be apparent from an inspection of the two price-charts (pp. 42, 44) in this record, and the deductions therefrom, stated on page 85 of this brief. A "corner" will be indicated on these charts by an abnormal rise of price in the latter part of a month followed by an abrupt decline on the first day of the succeeding month. These charts disclose no such condition during recent years. Indeed, Senator Capper, in explaining to the Senate the earlier of these bills, said (61 Cong. Rec., p. 5227):

> "In 1911 the Chicago Board of Trade put in a rule that has practically stopped manipulation of prices upward, sometimes called 'corners.' * * * Manipulation downward only hurts the producer, the grower of the grain. The boards of trade could prevent such manipulation, as 10 years ago they prevented manipulation upward."

Furthermore, "corners" were mainly a *struggle between speculators*, which prejudicially affected no one else. The producers were not hurt, because they were enabled to sell their grain on a higher market, and on the buying side of the market the effect was largely local. As stated by Professor Emery (Appendix, p. 32) an early "corner" in the Chicago market did not materially affect the price in New York.

The question here is thus reduced to, whether the fluctuations in this future trading are such as to abnormally *depress* the price of "cash" grain in interstate commerce to the prejudice of the producers.

Before coming directly to this question it will be helpful to look into history to see how the legislative mind of the past has at different times viewed speculative trading especially in grain.

About 400 B. C., in Athens, grain dealers were executed for buying more than fifty measures of corn and selling it at a profit. (See Oration of Lysias, the Attic orator, Appendix p. 48.) In 1698 time dealings in grain were forbidden in Antwerp.

In England "regrating"—buying of corn, etc., in any market and selling it again in the same market—was by statute (5 and 6 Edw. VI, c. 14) made a crime, as was also "engrossing"—the buying up of large quantities of corn, etc., with intent to sell again—and forestalling, whatever made the market dearer to the trader. This statute was repealed by 12 Geo. III. c. 71, and 7 and 8 Vict. c.

24. In 1733 a statute was passed in England (Sir John Barnard's Act) "to prevent the infamous practice of stock jobbing," which prohibited all sales of stock by parties not owning the same. This act was repealed in 1860.

In 1864 Congress passed the Anti-Gold Act, which forbade all contracts for the sale of gold which was not actually in the possession of the seller at the time of contract. This act was repealed two weeks after its passage.

A statute of New York, passed in 1812, declared void all contracts for the sale of stocks unless the seller at the time actually owned, or was authorized by the owner to sell, the same. This was repealed in 1858. In Pennsylvania a statute penalizing short-selling was passed in 1841 and repealed in 1862. In 1867 Illinois made it a misdemeanor for anyone to contract for the future delivery of grain unless he then owned and had possession of the grain (Illinois Laws, 1867, p. 181). The next legislature repealed this act.

Following the development of the system of grading grain and issuing warehouse receipts therefor there came into existence organized speculation in grain, which has been concentrated in the grain exchanges. Few things have been more misunderstood and more blamed.

Early in 1892, the House Committee on Agriculture reported favorably a bill (23 Cong. Rec., 2910 & 5071), one of whose objects was stated to be "to restore to the law of supply and demand that free action which has been destroyed by the practice of short-selling." The bill imposed a tax of twenty cents a bushel on all grain sold for future delivery, which the seller did not then have or have growing. The bill passed the House by a vote of

167 to 46. It also passed the Senate, with some minor amendments, on January 31, 1893, by a majority of 29, but too near the end of the short session to become a law. *Thus both houses of that Congress committed themselves to the proposition that all future trading in grain was prejudicial to commerce.*

In April, 1892, the United States Senate directed one of its committees to investigate the causes of the depression in agriculture and the remedies therefor. This committee recommended legislation which would result in the "suppression of the business commonly known as dealing in futures and options," and "restore silver coin to its ancient place as money." (53d Congress, 3d Session, Sen. Rep., 787.)

On May 8, 1894, the Committee on Agriculture of the House of Representatives filed a report (53d Congress, 2d Session, H. Rep., No. 845) recommending the passage of the second Hatch Anti-Option Bill—which imposed a prohibitive tax on sales of grain for future delivery *not followed by actual delivery*—and stating that the purpose of the bill was "to restore to the law of supply and demand that free action which has been destroyed by the practice of short selling." The bill passed the House by a vote of 150 to 89, but by this time the Senate had grown wiser and the bill was not put to a vote. Nothing more contributed to the final defeat of this attempted legislation than the arguments of the distinguished senator (afterwards Chief Justice), who said:

> "The system of future dealing, as found in this country today * * * is a part of the common acquisition of the *human mind for the last two hundred years or more.* * * * There is no political economical writer in any language recognized as authority, unless he be tinctured either with socialism or communism, who does not approve of these contracts and state that they are necessary for the

development of commercial affairs and that they operate wisely and beneficially upon both the producer and the consumer." (24 Cong. Rec., 931.)

On June 18, 1898, Congress created a non-partisan commission known as "The Industrial Commission," composed of five senators, five congressmen and nine other representatives of different industries, and required the commission, among other things, to investigate questions pertaining to agriculture and *to suggest such legislation as it might deem best.* Authority was conferred to compel the attendance of witnesses and to administer oaths. It made a partial report in January, 1901, and a final report on February 10, 1902. As a rule it examined only disinterested persons including experts who had given the subject exhaustive study. A perusal of the extracts from these two reports printed in the Appendix to this brief (pp. 2-14) will be found instructive here. Suffice it here to say that the commission found that future trading was helpful to the grain trade and did not depress prices. *The committee did not recommend the prohibition of, or any restrictions upon, future trading.*

In 1896 Germany passed a law prohibiting future trading in grain, which for a time suppressed all such future trading on the Berlin Bourse. The prejudicial consequences of this are pointed out by the writings of the German economist, Dr. Georg Wermert. (Appendix to this brief, pp. 16-18.) Subsequently future trading was renewed on the Bourse under some modified regulations approved by the Government.

While the agitation for this law was under way in Germany, the English Royal Commission on Agriculture entered upon an investigation of future trading in grain; but it was the unanimous opinion of the best experts that the prices in the speculative markets followed, and did

not lead, the prices dictated by the law of supply and demand and efforts at legislation were defeated. (See Appendix, p. 15.)

Indeed, some of our federal judges fell into the error of thinking that future trading on the Chicago Board of Trade was due to gambling and that for this reason the law should deny to the Board protection of the resulting quotations; but this court, in *Board of Trade* v. *Christie* (198 U. S. 236), rejected this view and brought the public mind to a right conception of the economic value of this future trading.

But the most recent practical demonstration of the value of future trading is that furnished by the present Secretary of Agriculture, when—this court having so phrased the stay order first entered in *Hill* v. *Wallace* as to stop all future trading on the grain exchanges—he at once moved this court to modify the order in order that great damage might not be done to the grain trade by the enforced cessation of future trading.

The bill avers (Rec., 14) and the evidence in the *Christie case* showed—that the grain buyers' profit in moving the grain from the farmers to the foreign market—which formerly was from five to eight cents a bushel—had been reduced to not exceeding two cents a bushel by the opportunity afforded by future trading to the grain dealers to insure themselves against price fluctuations by the making of "hedging" contracts.

Thus it will be seen that theories respecting speculative trading in grain, which had in the past been deemed by legislators to be economic truths and been made the basis of restrictive legislation, are now conceded to be economic fallacies. No thoughtful person now contends that on economic grounds public injury results from speculation in grain, or that all future trading on the grain exchanges should be suppressed.

It is one thing for the legislative power to mistake a false economic theory for the truth. Laws based upon it may be—as they often have been—easily abandoned or repealed. *It is a different, and far more serious, thing for this court to make an economic fallacy the basis for a far-reaching construction of the Constitution, which should, and generally does, endure.*

All that the proponents of this legislation now claim is that "sudden or unreasonable fluctuations in prices" in future trading "frequently occur as the result of speculation, manipulation or control," and that a depression of prices which results therefrom is "detrimental to the producers or consumers," and hence is a burden upon interstate commerce. This claim is expressed by the acting chairman of the committee (Senator Capper), in recommending the passage of the former bill, as follows:

> "The plain truth, Mr. President, is that through manipulation of the market the big speculators on the Chicago Board of Trade are undoubtedly a powerful factor in fixing the price of the farmer's wheat. They sell large volumes of wheat futures short during a period before harvest when there is no great volume of buying, and the weight of their selling forces the price down. Then, by continually hammering, they hold the price there until the crop movement begins, when hedging sales place sufficient pressure upon the market to enable the speculators to buy back what they sold without advancing the price."

The short-seller's only motive is to profit by correctly forecasting the price, at which grain will sell at a future day. He is ever conscious that there are others at hand, who are actuated by a like motive to profit by buying, when the market price is such as to promise profit.

Before one can sell he must find some other member of the exchange who, or whose customer, takes a directly

opposite view of the probable future price; the quantity bought equals the quantity sold. It is these conflicting views of many traders, which make the market. Thus future-trading but expresses the attempts of all participants therein to profit by correctly forecasting the future price. Each is acting under the highest incentive to be right, because of the severe loss that will result from being wrong. They all know that the ultimate factor is the law of supply and demand, as affected by the market conditions when the delivery time arrives. Their sole aim is to correctly appraise the effect of such conditions upon the operation of that law.

Thus future trading expresses the prevailing sentiment as to what the prices will be in the future month, just as the cash trading expresses the prevailing sentiment as to what the present proper price is.

To suggest that among short-sellers any other motive is a dominant one, either in the individual trader or in a group of traders, is to overlook the fact that he or they do not, like the "long" buyers, get an advantage from a limited storage capacity or a temporary and limited local supply. They are bidding against a world of buyers who can margin their trades as long as the sellers do. The seller always faces the necessity of either acquiring the actual grain to deliver or of buying back his contract in a market, where many others there are only too eager to take advantage of his mistaken judgment or misdirected effort.

But to be more specific,—the above charge of Senator Capper is disproved in the report of the U. S. Industrial Commission, which says (Appendix, pp. 6-12):

> "The question to be answered in this discussion is: 'Does speculation tend to lower prices?' If so, are the fluctuations of such a character as to injure the interests of the farmer as against those of the dealer or speculator? * * * That speculation

tends to lower prices permanently even the most outspoken opponents of the system of dealing in futures have not undertaken to charge. * * * Even if we were to admit that the speculative purchases and sales for future delivery could affect current spot prices, the opposite effects of the transactions of the bull and the bear would balance each other. * * * Our analysis thus shows that as far as there is a speculative influence in depressing prices, it is not exercised by the much abused short, but by his opponent, the bull. * * * Spot prices may and may not move in sympathy with the future prices, according to conditions of actual demand and supply. * * * This explains why spot prices are sometimes above future prices for the same month, although, as a rule, the latter are higher than the former by the amount equal to the cost of storage of the grain in the warehouse. * * * The professional speculator is in the market not for the purpose of either depressing or raising prices. * * * This leads to the conclusion that so far from being the cause of low prices short selling is rather a consequence, in the sense that it is indulged in only when it is thought that the natural tendency of the market is such as to favor a trend of low prices. * * * That is, under speculation, while fluctuations of prices are more frequent, they do not reach so wide extremes as they used to. * * * As we have attempted to show, it is a mistake to represent speculation in futures as an organized attempt to suppress prices to producers. * * * Because evidence believed to be conclusive has been presented showing that, under speculation, prices prevailing at the time when producers dispose of the greater part of their products are greater in comparison to the rest of the year than they were before the advent of modern speculation. * * * The purpose is to show that such differences in time prices are not caused by speculation, but can be adequately accounted for by the natural condition of supply and demand."

Professor Weld, of Yale University, obtained the average monthly prices of cash wheat in Chicago for the ten-year period, 1901 to 1910, and says (Appendix, pp. 39-40):

> "The difference between the average September price and the average May price is only 2.9 cents—hardly enough to pay for carrying wheat in an elevator for nine months. * * * In other words, the farmer year in and year out obtains as much and more for his wheat by marketing in the fall as by holding until the following spring. * * * Speculation not only tends to level prices throughout the year, but it performs a most signal service in making price changes over short periods less abrupt. * * * In this connection, the fallacy that short selling has the effect of generally depressing prices should be mentioned, * * * Suffice it to say that the pressure from the bull side is just as great as from the bear side (in fact there are likely to be more bulls than bears if anything), and that the bears tend to defeat their own purpose by having to become buyers, as explained above. Objections to speculation based on this time-worn argument appear to be decreasing."

As the result of an investigation of the English Royal Commisison on Agriculture, the Earl of Dudley, on behalf of the Government, stated in the House of Lords (Appendix, p. 16):

> "That the unanimous opinion of the best experts is that the price in those [speculative] markets follows and does not lead the price dictated by the laws of supply and demand. In fact, they are of opinion that this system of dealing in 'futures' instead of deteriorating prices, rather tends to equalise them and to counteract the fluctuations that always must exist."

Professor Paul LeRoy-Beaulieu, a noted French professor of Political Economy in the College of France, says (Appendix, p. 15):

> "The claim is often made in the United States and in Germany that future trading should be prohibited because it causes low prices of commodities. * * * There is little foundation for this reasoning, for future trading, so far as prices are concerned, tends as much to raise prices as to lower prices—much

more often indeed to do the former. * * * Speculation, after full account is taken of its evils and its benefits, of its advantages and its disadvantages, is one of the forces indispensable to human progress."

Dr. Georg Wermert (Appendix, p. 17), in discussing the prohibition of future trading in the German Act of 1896, points out that "prior to this time the wheat price had been lower in Vienna than in Berlin. But since the prohibition of future trading the price level in Berlin has fallen below that in Vienna."

Professor Emery in an article on the German law (Appendix, pp. 18 & 19), says:

"It must be admitted that the German law has proved a double failure. * * * Certainly no reasonable argument can be made for the claim that speculation reduces prices to the producer. On the contrary, the exact opposite is the case since it reduces greatly the margin between the farm price and the price of the central market."

Dr. Otto Johlinger, writer (Appendix, p. 20) says:

"Thanks to speculation, the time-differences in price and the place-differences in price are leveled down. As a consequence the fluctuations in price are much smaller than formerly. * * * Indeed, they show that it was future trading that finally put the grain trade on a safe basis and removed from it its former speculative character."

Professor John George Smith, of England, says (Appendix, pp. 22-27):

"The bear speculator is one of the strongest factors in steadying price movements, and in obviating extreme fluctuations. It is not that short sellers actually determine prices. All they do is simply, by the act of selling, to express their judgment as to what prices will be in the future. * * * Short-selling, therefore, does not unduly depress prices as is often asserted; but it is, instead, a very powerful agent in steadying them. * * * From the constant contests of short-sellers with the bulls a much truer level of

prices is evolved than could otherwise ensue. * *
One of the chief services rendered by expert specu
lation is the lessening of fluctuations, and the estab
lishment of prices which correspond to the actual con
ditions of supply and demand all the world over
* * * That speculative sellers do not control th
market is further borne out by the fact that price
of wheat and cotton rise and fall quite independentl
of the amount of dealings in futures. * * * Bu
statistics given in the British Association repor
[1900] do not lend support to the view that th
growth of futures markets in wheat has resulted i
a remuneration to the farmer less in proportion tha
formerly. * * *"

Professor Emery, of Yale, says (Appendix, pp. 29-33)

"In the first place, it is desirable to dispose of
more or less prevalent idea that speculative price
are determined 'regardless of the law of demand an
supply.' Such an idea is based on a complete mis
conception of the nature of value. The more fre
the competiton between buyers and sellers, the mor
minutely is price regulated by demand and supply
and nowhere is competition more free than on th
exchange.

Prices on the exchanges, however, are (and mus
be) determined by the existing demand and supply
* * * The familiar argument is, that short sellin
is a selling of products that do not exist, in additio
to those that do, and so furnishes a correspondin
increase of supply, which necessarily depresse
prices; and then figures representing enormous sale
are brought forward as statistical proof. These sales
however, are also purchases, and the question o
their amount is of no importance. * * * A com
parison of the degree of depression with the amoun
of future sales shows that increased speculation ha
always accompanied higher prices. * * * Wha
then is the effect of speculation on prices? Pri
marily, as has been shown, it acts to concentrate i
a single market all the factors influencing prices
In this way a single price is fixed for the whole world
* * * Perhaps the most potent influence in pre
venting wide fluctuations is the much maligned short
seller. * * * There are always some shorts ready

to buy in as prices first fall, and some bulls ready to sell out as prices first rise, and these forces are very effective in graduating prices. So perfectly does the system work that a sudden change in price, of any importance, is very rare. * * * The tendency of speculation is to lessen marked fluctuations and to establish prices which correspond to actual conditions of demand and supply in all places."

Professor Boyle, of Cornell University (Appendix, pp. 33-35)—

"Applying this test of supply and demand to the [Chicago] Board of Trade wheat prices for the ten normal years, 1905-1914, we find that the daily prices do fluctuate in accordance with supply and demand factors. * * * It may now be stated at this point, that future price does not determine cash price. The conclusion seems warranted that neither future nor cash price has a dominating influence, permanently, over the other, but that both are merely effects of supply and demand causes. They are, in short, effects of the same underlying causes. * * * It seems fair to conclude, therefore, that speculation in grain on the organized exchanges lessens price fluctuations. * * * Speculation does not fix prices, but registers prices. * * * There is little room for doubt that should the organized grain exchanges be abolished (and particularly future trading) the grain trade would very rapidly be centralized in the hand of a few powerful houses. * * * But the speculators in the future market, numbered by the tens of thousands, * * * are too widely scattered and too independent to be controlled—so long as the market remains free and open to them.

Professor Ely, of the University of Wisconsin (Appendix, pp. 36-37)—

"We are not here concerned with the general evils of speculation but with the prevalent belief that speculative dealing in futures tends to reduce prices. * * * This particular charge against speculation is confirmed neither by *a priori* reasoning nor by inductive analysis. * * * The average prices of spot wheat in September, October and November—

just after harvest, when the ordinary farmer is compelled to sell—have been nearer the average price for the entire year, since the speculative wheat market has become highly organized, than in the forties and fifties when wheat was sold like any other farm product. And there are reasons for the belief that speculation has not only equalized yearly fluctuations, but that the leveling has been up, not down, in the interest of the farmer who is compelled to sell after harvest, as opposed to the wealthier miller or trader who in the past carried over a supply for the lean months."

Professor Seligman, of Columbia University (Appendix, pp. 43-44)—

"The chief economic function of regular speculation consists in the assumption of risk and results in the equalization of price. * * * The result of regular speculation, again, is to steady prices. * * * Speculation thus tends to equalize demand and supply, and by concentrating in the present the influences of the future it intensifies the normal factors and minimizes the market fluctuation.* * *"

Professor Ivey, of the University of Nebraska (Appendix, pp. 44-45)—

"Strange to say, speculation has been accused of causing wide price fluctuations, and hence has been thought to depress business. The truth is that under normal conditions speculation stabilizes price, while lack of speculation permits an erratic market. * * * Speculation thus produces market equilibrium. * * * During a period of 100 years, before future trading was inaugurated, price fluctuations were twice as great as during the period since that date."

Professor Grover G. Huebner, of the University of Pennsylvania (Appendix, pp. 45-47)—

"Cotton and grain growers not infrequently contend that it depresses the prices which they receive. * * * The sale of futures, whether as a short sale or otherwise, does not, however, have such a depressing effect. * * * 'This popular misconception of short selling overlooks the

extremely important fact that influential speculators seldom undertake deliberately to contest natural conditions at least for any length of time. * * *" * * * Statistics as well as common trade knowledge indicate that in the years when the volume of future sales is greatest spot prices are usually higher than when speculation is at low ebb."

Professor Hibbard, of the University of Wisconsin (Appendix, p. 47)—

"It has been shown repeatedly that fluctuations in prices before the development of organized speculation were not only as violent as, but usually more violent than, they have been since that development. * * * In the case of the wheat market, the records show fluctuations to have been greater before the time of exchanges than since. * * *"

The views of these writers are confirmed by the two price charts of Chicago cash wheat prices (the one covering a period of 81 years) contained in this record (pp. 42, 44.)

The claim asserted in section 3 of The Grain Futures Act— that sudden or unreasonable fluctuations in prices frequently occur as the result of speculation, manipulation or control, in future trading, and constitute a burden upon interstate commerce—is also *expressly negatived* by the affidavits of twenty or more professors of political economy in our leading universities, which form part of this record (pp. 40-71.)

Thus this concurrence of view in the minds of those, who are best qualified to know, clearly establishes (1) that future trading has not produced sudden or unreasonable fluctuations in prices; (2) that such fluctations do not freqently occur as the result of speculation, manipulation or control, and (3) that such fluctuations as do occur in future trading are not detrimental to the producers or consumers, or a burden upon interstate commerce.

Furthermore, there was nothing in the hearings before the committees of Congress preceding the passage of this and the former act to justify these recitals in section 3 of the act. These committees did have "hearings," at which the proponents and opponents, without being sworn, were heard, and all they said has been printed as public documents under the heading of "Hearings before the Committee on Agriculture." Professor Seligman, of Columbia University, before making his affidavit in this record, read over these documents, and found nothing in them to sustain these recitals of section 3. And any one perusing them will reach the same result.

The next question is—what are the limitations of the commerce power of Congress? In an early case (*Passenger Cases*, 7 How. 402) this court said:

> "A State cannot regulate foreign commerce, but it may do many things which more or less affect it."

Again, this court, in passing upon certain rules of a live stock exchange, regulating agents' commissions, said in

Hopkins v. *U. S.*, 171 U. S. 578, 591-594:

> "Charges for services of this nature do not immediately touch or act upon nor do they directly affect the subject of the transportation. Indirectly and as an incident, they may enhance the cost to the owner of the cattle in finding a market, * * * they are not charges which * * * are charges upon commerce itself. * * * There must be some direct and immediate effect upon interstate commerce in order to come within the act. * * * The indirect effect of the agreements mentioned might be to enhance the cost of marketing the cattle, but the agreements themselves would not necessarily for that reason be in restraint of interstate trade or commerce. The effect upon the commerce spoken of must be direct and proximate. * * *
>
> An agreement may in a variety of ways affect interstate commerce, just as state legislation may, and

> yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation is not direct."

Again, this court in adjudging unconstitutional an act of Congress prohibiting a carrier engaged in interstate commerce from discharging an employe simply because of his membership in a labor organization, said in

Adair v. *U. S.*, 208 U. S. 161, 178:

> "Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the States, must have some real or substantial relation to or connection with the commerce regulated."

Again in

Hooper v. *California*, 155 U. S. 648, 655, this court held that "The contract of insurance is * * * a mere incident of commercial intercourse," and not a part of interstate commerce.

Among numerous other decisions by this court illustrating this principle are the following:

Smith v. *Maryland*, 18 How. 71;
Blumenstock v. *Curtis Publishing Co.*, 252 U. S. 436;
Brodnax v. *Mo.*, 219 U. S. 285;
Merchants Exchange v. *Mo.*, 248 U. S. 365;
Field v. *Barber Co.*, 194 U. S. 618.

Under these authorities whatever is intrastate in character must, in order to be a burden upon interstate commerce, (1) directly touch or affect such commerce, and (2) affect it in a substantially injurious way. In other words, it must be a direct and onerous burden upon such commerce.

Does then this intrastate future trading thus burden interstate commerce? *Considered in its entirety,* no one

claims that it does. All concede that future trading is distinctly helpful to commerce.

All that is claimed by the proponents of this legislation is, that the *prices* made in this future trading at times prejudicially depress prices in interstate transactions in grain. It has already been shown that this is a false premise.

But assuming it to be a true one, can it be said that such intrastate prices so directly and materially affect interstate prices as to constitute a burden on interstate commerce? As we have already seen, interstate traders in grain are not obliged to accept, nor do in fact accept, these intrastate prices as the prices in their interstate transactions. They constitute but a part of the information upon which such traders act in agreeing upon their prices. If Congress may justify interference with this purely intrastate trading upon the theory of protecting the normal play of the law of supply and demand as respects grain, it may upon the same grounds regulate the numerous exchanges, where stocks, eggs, butter and other produce are dealt in, and whose prices are quoted in the daily press. Thus is presented the question, whether purely intrastate trading becomes subject to the commerce power of Congress *merely because it frequently indirectly affects prices in interstate commerce.* But there can be no distinction between intrastate *prices* and anything else of an intrastate character, which affects interstate prices. In other words, the question here is whether every intrastate employment, business, or condition is within the commerce power of Congress, if it in any way affects prices in interstate commerce.

If so, then this court was wrong in adjudging unconstitutional the first Child Labor Law; because the employment of child labor in the manufactures of one state would certainly have a tendency to demoralize interstate

prices for the same articles, which are manufactured in an adjoining state which prohibits child labor. Indeed, this court seems to have met this view, when it refused to uphold the child labor law on the ground of unfair competition.

Again, if the protection of prices in interstate commerce is to be held to justify the exercise of the interstate commerce power, that power will be enlarged far beyond any present conceptions of it. Wages of labor employed in manufacture and other elements of manufacture materially affect the prices of such manufactured products as subsequently enter into interstate commerce. Is the commerce power broad enough to regulate labor employed in, and other features of, manufacture? This court in *United States* v. *Knight & Co.*, 156 U. S. 1, 17, stated that combinations which raise or lower prices or wages in domestic enterprise only indirectly affect interstate commerce. See also

Railroad Co. v. *Richmond*, 19 Wall. 584.

We do not here contend that Congress may not treat as an obstruction to commerce persons, who combine for the purpose of *directly* fixing or affecting prices in *interstate* commerce (as in the *Addyston Pipe case*, 175 U. S. 211; the *Swift case*, 196 U. S. 375, and the *Patten case*, 226 U. S. 525), but only that acts which may directly influence prices in *intrastate* trading in grain for future delivery can only *indirectly* affect, if at all, the *interstate* buying and selling of grain *for immediate delivery;* and that such acts are, therefore, beyond the commerce power of Congress.

We therefore submit that the fluctuations in the prices in this future trading do not, within the contemplation of law, constitute a burden upon interstate commerce because

(1) They but express the operation of the law of supply and demand and are not the result of manipulation or control, and

(2) If they did result from improper manipulation or control, they would not so directly and materially affect interstate trading as to constitute a burden thereon.

Point III.

The present act is not one to remove an alleged burden upon interstate commerce.

The extent of this commerce power of Congress varies with the condition or subject matter, with respect to which it is called into play. The question is one of repugnancy. Does the act or condition sanctioned or permitted by the state conflict with what is properly within the sphere of federal power? The laws of Congress are only paramount so far as Congress has power to go—that is so far as the nature of the federal power extends. Congress may adopt all appropriate means, which are conducive or adapted to the end to be accomplished. But whether the means adopted in the particular case are of this character, or are but a pretext to accomplish something beyond the power of Congress, is finally a question for this court. The extent of the grant of power must necessarily be judged by, and limited to, its object. Here the power is only one to remove burdens upon interstate commerce; and the question is, whether The Grain Futures Act can be considered as only a means to that end.

If the condition or subject matter is wholly of an interstate character, the extent to which the power may be exercised, rests exclusively within the discretion of Congress.

But if the condition or subject matter be partly of an interstate and partly of an intrastate character—that is, if the two are intermingled, as in the case of railroads and telegraph companies doing both an interstate and intrastate business—this commerce power will be judicially confined to that which is interstate; and a regulating act of Congress which is not thus confined will be adjudged invalid.

Trade-Mark Cases, 100 U. S. 82.

This limitation is recognized in the acts creating the Interstate Commerce Commission and the Federal Trade Commission, which confine such commissions to the regulation of interstate activities.

The only qualification to this principle is found where there is an intermingling of interstate and intrastate elements—as in the case of railroads—and that which is interstate cannot be protected or regulated without also touching that which is intrastate—as, for instance, where interstate rates cannot be adequately maintained without also regulating such intrastate rates as affect the interstate rates.

Minnesota Rate Cases, 230 U. S. 354;
Houston Ry. Co. v. *United States*, 234 U. S. 342.

This is upon the theory that the state rates are a discrimination, as against the interstate rates, and hence are a burden upon interstate commerce; but here the federal power is limited to the removal of the obstruction.

Illinois Cent. R. R. v. *Public Utilities Com.*, 245 U. S. 493.

Even here Congress may not use this qualification of the general principle as a pretext for regulating intrastate commerce, which is not thus directly related to that which is interstate.

Still another phase of the question is presented where the condition or subject matter is wholly within intrastate commerce, but it gives rise to certain incidents or opportunities, which enable evilly disposed persons to so act as to create an obstacle to or burden upon interstate commerce. The commerce power here should—if the spirit of the Constitution is not to be violated—be confined to measures directly aimed *at the obstacle and those who create it.* Congress may not use such obstacle as a pretext or excuse for absorbing complete control of such intrastate commerce in respect to things and persons in no way responsible for the supposed obstacle or burden. The present case falls within this last phase of the question.

Again, when one is guilty of criminally wronging either individuals or society at large, the law provides two, and only two, remedies. The state or nation may stop it by a resort to its civil courts, where an injunction is an effective remedy; or it may enact a criminal statute and therein prescribe—and enforce—such penalty or punishment as will deter such wrongdoing. Congress may not compel a trade agency created by a state and not itself participating in the offense—as a condition of its continuing to participate in purely intrastate commerce—to actively assist the nation in the enforcement of its laws—that is, become the police officer or the criminal court of the General Government.

The obstacle here claimed is overtrading which prejudices prices in interstate commerce in grain. The grain exchanges never trade at all: they merely maintain halls where others trade. The great majority of the members of exchanges are not guilty of overtrading. As the bill avers (Rec., 9, 12), approximately six-sevenths of all future trading upon the exchanges takes place on the Chicago Board of Trade. Of its 1,600 membership,

many are bankers, officials of railroad and steamship companies, packers, etc., who are not active members of the Exchange. Many more act only as agents in receiving consignments of grain, or in the making of contracts for future delivery. None of these trade at all for future delivery.

Of the members and non-members, who, by buying or selling grain for future delivery, seek to profit by the rise or fall in prices, most of them trade only in too small quantities to affect prices; and of the small number of persons, who have sufficient capital to, and do, trade extensively, many are not members of the Exchange; and few, if any, are able to manipulate or control prices. If Congress may regulate future trading on the exchanges, because a few individuals abuse the privilege of trading there, it may also regulate hotels because some persons abuse the privilege of being guests in a way to violate the Mann Act.

The Grain Futures Act does not in the section (9), which provides for the enforcement of the act through the criminal courts, include as an offense manipulation or overtrading. The act, however, does in fact, in section 6, make an attempt to manipulate a crime. When this is ascertained by the commission which the act creates, the offending person is punished by being deprived of the right to trade on any exchange—which may be his only vocation—and the exchange is required to cooperate in imposing this punishment, as a condition to the exercise of its right to conduct its purely intrastate business. Thus the exchange—which is not guilty of manipulation or overtrading—is punished by this law by being restricted in its right to pursue a lawful business. In other words, the exchange is compelled by Congress, in the exercise of its commerce power, to do police duty in the enforcement of a federal act as a condition to

its transacting business that is purely intrastate.

The act is, therefore, not one to remove an obstruction to commerce, because it does not adopt the only appropriate means for doing so—a statute aimed at those who create the obstacle. See in this connection, *U. S.* v. *Dewitt*, 9 Wall. 41, where this court held that Congress could not prohibit the making of some oils in order to increase the production of others that it taxed.

Point IV.

THE REMOVAL OF AN OBSTRUCTION TO INTERSTATE COMMERCE IS A MERE PRETEXT, UNDER WHICH CONGRESS SEEKS TO REGULATE WHAT IS EXCLUSIVELY INTRASTATE COMMERCE.

The Future Trading Act was an attempt to regulate the exchanges under the pretense of raising revenue. The present act aims to do the same thing under the guise of an act to remove a burden upon interstate commerce.

This is apparent from the following facts:

(1) The act asserts that these price fluctuations obstruct interstate commerce in grain, when, as we have shown, there is no basis in fact for such a claim.

(2) Its remedy is not adapted to the disease. It is not confined to the removal of what is claimed to be an obstruction, nor to those who may create it. It is not such as would be resorted to, if the removal of the alleged burden were the only purpose of the act.

(3) The provision of the act (section 5 (e)) which forces into membership representatives of farmers' organizations, and exempts them from compliance with the commission rule, *has no relation whatever* to the removal of the burden to commerce alleged to result from over-

trading. No one will claim that the admission to membership of a few farmers will affect in the slightest the volume of future trading.

Add to the above that this act re-enacts *verbatim* the regulatory features of The Future Trading Act—which in its title professed to be "for the Regulation of Boards of Trade"—and it ought to be obvious that the present act, under the pretense of removing an alleged burden to interstate commerce, is in reality but a second attempt to subject the grain exchanges—as respects their purely intrastate commerce—to bureaucratic control by the Secretary of Agriculture.

What this court said in *Hill* v. *Wallace* of The Future Trading Act is equally true of this later act, that "It is impossible to escape the conviction, from a full reading of this law, that it was enacted for the purpose of regulating the conduct of business of boards of trade through supervision of the Secretary of Agriculture and the use of an administrative tribunal consisting of that Secretary, the Secretary of Commerce, and the Attorney-General."

Point V.

THE GRAIN FUTURES ACT CONFLICTS WITH THE LEGISLATIVE DISCRETION OF THE STATES RESPECTING THEIR INTRASTATE COMMERCE, AND IS IN ITSELF A BURDEN UPON THAT COMMERCE.

The Chicago Board of Trade is typical of all the grain exchanges. It neither buys nor sells. It is not an organization for profit. It is merely an instrumentality of trade created by the state, by means of which its members join in maintaining an exchange hall, where they may meet and trade as individuals, and by means of which they may determine, who are fit persons to share in these

trading privileges, and they promulgate rules to promote their business relations and to fix the terms of, and to enforce, the contracts which they make with one another.

Practically all who personally make trades in the exchange room are residents within the state of Illinois. All the trading for future delivery—which constitutes much the larger part of the trading in the exchange room—is intrastate commerce (*Hill* v. *Wallace*); the selling on commission by members in the exchange room of grain consigned to them by the owners is, as respects the service they render, intrastate commerce (*Hopkins* v. *United States*, 171 U. S. 587); the buying of grain by members on the commission basis is of the same character. Much of the buying and selling for immediate delivery upon the Exchange is necessarily between persons, who reside in Illinois, and relate to grain, which has never been out of Illinois; while most of the buying and selling of grain by members of the Exchange for deferred shipments to or from Chicago is not made in the exchange room, but by letters or telegrams between the offices of such individual members and the other parties to such purchases or sales. In other words, the business attributable to the existence of the Exchange is preponderatingly of a domestic, as distinguished from an interstate, character.

Future trading on the Exchange, which takes place in the "pits" is distinctly separable from the "cash" trading, which takes place around the sample tables in the exchange room; and this future trading is wholly intrastate commerce.

Because of this local character of exchanges and of the business conducted in their exchange halls it has become settled that the general regulation of the grain ex-

changes and their activities belongs to the states and not to the federal government.

Hill v. *Wallace;*
Brodnax v. *Missouri,* 219 U. S. 285;
Merchants Exchange v. *Missouri,* 248 U. S. 365;
Ware & Leland v. *Mobile County,* 209 U. S. 405.

This state power is consistent with the federal power to prevent anything arising out of this intrastate commerce from becoming a burden upon interstate commerce, as was claimed to be the case in *U. S.* v. *Patten,* 226 U. S. 525, and *Board of Trade* v. *U. S.,* 246 U. S. 231.

As said in *Hammer* v. *Dagenhart,* 247 U. S. 275: (*italics ours.*)

> "The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution. * * * The power of the States to regulate their purely internal affairs *by such laws as seem wise to the local authority* is inherent and has never been surrendered to the general government."

This court also said in *McCulloch* v. *Maryland,* 4 Wheat. 316, 421:

> "The sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people."

And that spirit of fairness, which should prevail as to all questions arising between the individual states and the nation, requires that a similar latitude in the exercise of discretion should be accorded to the state legislatures when acting within their proper field.

When called upon to legislate respecting grain ex-

changes and future trading thereon, the Illinois legislature had the choice of three alternatives:

First: It might have wholly prohibited all future trading either on moral or economic grounds, if this would not conflict with the right to contract guaranteed by the state and federal constitutions.

Second: It might adopt what may be appropriately called the *laissez-faire* method—that is, it might by its charter leave to the members of the exchange, which it was creating, the adoption and enforcement of such rules, as they thought best suited to produce a free, broad and efficient grain market. This in the belief that such members were more directly interested in attracting the grain trade to their market, and were by their training and business experience best equipped to restrain any overtrading—the state itself refraining from any attempted regulation of, or interference with, price-making, and contenting itself with such statutes as would prevent incidental abuses, such as the running of "corners," trading in "puts" and "calls," and improper trading for future delivery by individuals, where the mutual intent to deliver was not present.

Third: The legislature might have adopted a method —which may be called the *bureaucratic method*—such as Congress has prescribed in The Grain Futures Act.

This method rests upon the theory that the members of an exchange are either too selfish or too ignorant to appreciate that their interest is to maintain, in competition with the other grain exchanges, the most efficient market possible. It rests on the theory that the natural law of supply and demand unaided does not, and cannot, always operate in the grain markets.

This method suggests, except in one respect, the thermostat, which in our homes and offices turns off the heat

when it is too warm and turns it on again when it is too cold. Thus this method is to furnish—at the meager salary which our governments pay those who serve them—a deputy of a high official, who is possessed of all the wisdom necessary to keep the markets at the proper price level. To enable him to do this he is to know by access to the brokers' books what the total volume of open contracts is, and how much each broker (and each customer of each broker) has open on the market.

The total volume of sales will not enlighten him, because he will find the same number of bushels bought. The existing volume of trading will not aid him, because this has no relation to prices, which at times go up or down on light trading and at other times do the same on brisk trading.

What, then, is to determine for him whether the price at any given time has been deflected from the normal by overtrading? Nothing but his own wisdom.

If in his superior wisdom—supplemented by that his chief, immersed in other important duties, is able to contribute—this deputy finds that the future market has too much steam on, that is, that prices are going up too far, he will cut off that steam by telling certain brokers and their customers to curtail their purchases; and they will be quick to obey, because otherwise the high official may have them thereafter denied access to all future markets. If this deputy finds that the market is going lower than he thinks it ought to, he will turn on more steam by requiring brokers and their customers to curtail their short-selling. Thus he is to become the embodiment of, or a substitute for, the natural law of supply and demand.

The difference between this method and the thermostat is that, while the latter is controlled by natural law, this trade thermostat is to run upon the superior wisdom of a

single human mind. Instead of natural prices there is to be substituted man-made prices.

It is unfortunately true that to err is human, and this wise man may sometimes err; or he may be naturally more sympathetic toward the farmers' side of the market than toward the consumers' side, in which case he will with the best of intentions warn off the sellers that the buyers may the better put the market up. Or this deputy might himself trade and thus become interested in the course of prices.

But what is sure to happen under this method is that many buyers and sellers will not speculate in a market where the prices are to be man-made or man-controlled; and thus the future market will cease to be the broad one that it should be to properly function.

The present able Secretary of Agriculture may be able to prevent the tendency above indicated, but he will not always continue in office; and one has to reflect that Secretaries of Agriculture have been heretofore, and doubtless will be hereafter, selected from environments which are liable to create a desire to help the farmers, even at the expense of the consumers. Certainly the Illinois legislature might well have despaired of being able to secure at all times the services of a deputy of the requisite wisdom to administer efficiently this bureaucratic method for the control of its great grain market.

Of the three methods above mentioned, the state of Illinois—in the exercise of that legislative discretion, which it may claim as its right—has adopted, and steadily adhered to, the second or *laissez-faire* method. For the legislative mind often finds expression in silence. This is as true as respects state legislatures as this court has declared it to be as respects Congress. In other words,

Illinois has adopted the view so well expressed by this court in *Board of Trade* v. *Christie*, 198 U. S. 236, 247-8, "that the natural evolutions of a complex society are to be touched only with a very cautious hand."

In the exercise of its legislative discretion this state has also conferred on this Board of Trade the right to say what persons are fit to become and remain its members, instead of reserving to itself control over memberships.

Nor is it surprising that Illinois has adopted, and adhered to, this policy; for thereby it has secured for its principal city the "greatest grain market in the world," and the efforts and wisdom of its grain dealers have also produced the most economical and efficient method of marketing the crops that the world has ever known.

What, then, does Congress by this Grain Futures Act propose? It does not claim that future trading, as sanctioned by the state of Illinois, is not, when considered in its entirety, a great benefit both to the producers and the consumers, or that it is a burden upon interstate commerce. All that it does claim is that one of the elements or incidents of this trading, *considered by itself*, is prejudicial to commerce and should be regulated by applying to all future trading the human element in the shape of a more strict governmental control. But this is nothing more than that Congress says to the Illinois legislature: "You have not exercised your legislative discretion as wisely as we think you should, and therefore Congress will exercise it for you."

Hence this Grain Futures Act is invalid as impairing that legislative discretion which the tenth amendment reserves to each state when legislating respecting its internal commerce.

In this view The Grain Futures Act instead of being

one to remove a burden upon interstate commerce is one which imposes a burden upon intrastate commerce by impairing the right of the state to regulate it.

Point VI.

THE ACT CANNOT BE SUSTAINED UNDER THE POWER OF CONGRESS TO ESTABLISH POSTOFFICES, OR UNDER ITS CONTROL OF INTERSTATE COMMUNICATION BY TELEGRAPH OR TELEPHONE.

The act imposes a heavy fine upon any person, who shall transmit through the mails or by interstate telegram or telephone "any offer to make or execute, or any confirmation of the execution of, or any quotation or report of the price of, any contract of sale of grain for future delivery on or subject to the rules of any board of trade in the United States," except where such contract is made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a "contract market."

The purpose here is not to exclude from such avenues of communication a message or letter or quotation that is false or obscene or fraudulent in itself or will promote fraud or other illegal conduct. The prohibition is not based upon the nature of these communications. Their character will not be changed by the mere designation of the exchange as a contract market.

Its only purpose is to compel the exchange to accept designation as a contract market by denying its members —if the exchange refuses to so qualify—the privilege of communicating with their customers through the mails or by interstate telegram or telephone. The prohibition is in the nature of a penalty. It is one of the enforcing provisions of the act.

THE POSTAL POWER.

The Constitution confers on Congress power "to establish postoffices and post roads." Under this power this court has upheld acts of Congress excluding from the mails, lottery tickets and circulars, and other matter deemed injurious to the public morals.

Ex parte Jackson, 96 U. S. 727;
In re Rapier, 143 U. S. 110;
Public Clearing House v. *Coyne*, 194 U. S. 497;
Leach v. *Carlile*, 258 U. S. 138;
Lewis Publishing Co. v. *Morgan*, 229 U. S. 288.

In all these cases the exclusion has been based upon the actual character of the matter excluded or upon facts having an obvious and logical relation to a purpose and intent of parties to misuse the mails.

In these cases this court has said that this power is not absolute. Thus in *Ex parte Jackson, supra,* this court said that regulations must be enforced "consistently with rights reserved to the people, of far greater importance than the transportation of the mail." And that, "No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the Fourth Amendment of the Constitution."

In *In re Rapier, supra,* the court said: "We cannot regard the right to operate a lottery as a fundamental right infringed by the legislation in question."

In *Lewis Publishing Co.* v. *Morgan, supra,* this court said that "The exertion of the power of course, at all times and under all conditions being subject to the express or necessarily implied limitations of the Constitu-

tion. * * * We do not wish even by the remotest implication to be regarded as assenting to the broad contentions concerning the existence of arbitrary power through the classification of the mails."

In *Burton* v. *U. S.*, 202 U. S. 344, 371, this court said that a statute providing for the exclusion from the mails of fraudulent matter must be "consistent with the rights of the people as reserved by the Constitution."

In *Hoover* v. *McChesney*, 81 Fed. 472, it is held that the right to the use of the mails as well as the use of the transportation lines is a property right, which could not be taken away except by due process of law.

Interstate Communication by Telegraph or Telephone.

There rests upon all transporting instrumentalities, whether state or interstate, and whether they carry—as early stagecoaches did and modern railroads now do—tangible property, or as telegraph companies they transmit messages, or as telephone companies they merely carry the sound of the human voice, the duty to serve all without discrimination. This duty, as applied to the instrumentalities then existing, was a part of the common law at the time the Constitution was adopted.

Out of this duty arises the correlative right of everyone to be served as all others are. This right also existed when the Constitution was adopted; and it could not have been its intention to impair this common right to service, when it conferred upon Congress, as a part of its commerce power, the right to regulate all interstate transporting instrumentalities.

Hence comes the principle that, while Congress may prevent such service from being misused for immoral purposes, or to further lotteries or other evil designs, it

may not exclude persons from sharing in the service in order to force an assent to the exercise of a power not possessed. "A constitutional power cannot be used by way of condition to attain an unconstitutional result." (*Western Union* v. *Foster*, 247 U. S. 114.)

It follows, therefore, that *any* attempt to thus exclude presents the same question, whether made through a regulation of a railroad, a telegraph, or a telephone company.

As respects a railroad, this question is no longer an open one in this court; for, while it has sustained a statute preventing interstate carriers from transporting lottery tickets (*Lottery Case*, 188 U. S. 321), and the Pure Food and Drug Act preventing the shipments of adulterated articles (*Hipolite Egg Co.* v. *U. S.*, 220 U. S. 45), and the White Slave Act prohibiting the transportation of women for immoral purposes (*Hoke* v. *U. S.*, 227 U. S. 308); this court has also in

Hammer v. *Dagenhart*, 247 U. S. 251,

annulled an act of Congress which penalized any manufacturer for delivering "for shipment in interstate or foreign commerce * * * the product * * * of any * * * factory * * *" employing child labor, this court saying:

> "The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. The goods shipped are of themselves harmless. * * * The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture. * * * In our view the necessary effect of this act is, by means of a prohibition against

> the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely state authority. Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend. The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed."

The above principle should be regarded as equally clear as respects telegraph and telephone companies. Indeed, this act also impairs the "freedom of speech" guaranteed by the Constitution, which includes what is spoken (over the telephone) and what is written.

Indeed, Congress may no more obstruct intrastate commerce (except where necessary to the proper regulation of interstate commerce) than the state may obstruct interstate commerce; and a Federal statute, like the present one, which prohibits one from transmitting by telegraph or telephone an order to his agent in another state to make there for him an intrastate contract, does obstruct and burden intrastate commerce in a way not permissible within the spirit of the constitution.

Again, the principles above stated apply also to the mail service. If this were provided by private enterprise, as Herbert Spencer advised, the applicability of this duty to the mail would be self-evident. As the Government has retained the monopoly of the mail service, and as it is a service that all must have, it could not have been the intention of the Constitution that the ser-

vice should be free from the duty to serve all alike, or that it might be used to indefinitely enlarge the other limited powers of Congress.

If the right to thus discriminate in the rendering of this service of interstate communication were sustained, it would bring within the regulatory power of Congress every business or enterprise of a purely intrastate character; for they all must use the mails and the facilities for interstate telephone and telegraph communications. Thus the tenth amendment to the Constitution would become a practical nullity.

Point VII.

THE INSURANCE FEATURE.

Section 3 of the act recites that future contracts are utilized by shippers and dealers engaged in interstate commerce "as a means of hedging themselves against possible loss through fluctuations in price."

Section 4 of the act makes it unlawful for any person to make a contract of sale upon an exchange "which is or may be used for hedging any transactions in interstate commerce in grain," except it be made through a member of a "contract market."

These provisions seem to be based upon the theory that, because those who ship grain in interstate commerce resort to future trading *to get insurance*, future trading is thereby subject to the interstate commerce power.

But this court has held that the business of insurance is not commerce, nor an instrumentality of commerce, but a mere incident thereto.

Paul v. *Virginia*, 8 Wall. 168;
Hooper v. *California*, 155 U. S. 648;
New York Life Ins. Co. v. *Cravens*, 178 U. S. 389.

Surely the mere form or method, in which such insur-

ance is furnished can make no difference in the principle; and the foregoing provisions furnish no constitutional basis for the act.

Point VIII.

other minor features of the law.

Section 3 recites that future trading is "affected with a national public interest." It hardly seems necessary to say that Congress may not by such a declaration enlarge its interstate commerce power.

Section 4 makes unlawful any future contract—not made through a "contract market"—"which is, or may be, used for * * * determining the price basis of any such transaction in interstate commerce in grain." As already pointed out (p. 19) the prices in future trading do not determine, in the sense of fixing, the prices in interstate trading, but at best are only a part of the information, which the interstate traders consider in fixing their own prices. This clause therefore seems meaningless.

Section 4 also makes unlawful any contract—not made upon an exchange that has become a "contract market"—which *is or may be used* for delivering grain sold, shipped or received in interstate commerce for the fulfillment thereof. It has already been pointed out (p. 9) that the only grain deliverable upon future contracts is grain represented by warehouse receipts issued by the public grain-mixing warehouses of Illinois covering grain that has entirely lost any interstate character it may have had. The thought behind this provision seems to be that, if any *ingredient* in a commodity possessed an interstate character, the commodity continues to be one in interstate commerce. This repudiates the original package doctrine, and would make many kinds of manufacture inter-

state commerce, because some of their raw materials originally were of that character. This clause, therefore, has no proper relation to future trading, which the act seeks to regulate.

Point IX.

THE PROVISION OF THE ACT (SEC. 5 (e)) REQUIRING EXCHANGES TO ADMIT TO MEMBERSHIP REPRESENTATIVES OF CO-OPERATIVE ASSOCIATIONS OF PRODUCERS, AND SANCTIONING "PATRONAGE DIVIDENDS" DEPRIVES THE BOARD OF TRADE AND ITS MEMBERS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

This identical provision was in The Future Trading Act, and was by this court held to be not within the commerce power of Congress. That decision would seem to require this court to hold the provision, when repeated in the new act, also invalid; for this provision—as shown on page 44 hereof—has no tendency whatever to remove or minimize the fluctuations in prices in future trading, which are claimed to be a burden upon interstate commerce. In other words, the reasons alleged for reenacting some of the provisions of the former act, and which are thought to justify the new act, have no application to this particular provision.

But this provision is also unconstitutional upon the further ground that it violates the due-process provision of the Constitution.

All private property is held subject to the proper exercise of the power to impress property with a public use, and any statute, which is the exercise of this power, does not violate the Constitution by depriving the owner of his property without due process of law.

Munn v. *Illinois*, 94 U. S. 113.

The question here is whether section 5 (e) of The Grain Futures Act can be sustained as a proper exercise of this power. This calls for a consideration of the origin and scope of this power.

The early common law divided business occupations and the properties used therein into two classes. One included those which were strictly private. In these the common law permitted the owners to sell, or refuse to sell, their property and their services in connection therewith as they pleased, and to charge therefor any price they saw fit. They could serve, or allow the use of their property to, one person, and refuse a like privilege to another for no reason whatsoever.

The other class comprised those occupations, in which owners had so used their property that the public acquired an interest therein to such an extent that such owners were not permitted either to discriminate between those desiring to share in the service rendered, or to make an unreasonable charge for such service. The common law placed on such owners the duty to serve all alike and at reasonable rates.

In this class were the local miller, the inn-keeper, the carrier (in that age a stage-owner), the owner of a wharf on a navigable water (wharfinger), etc.

As travel and transportation developed, it gave rise to railroads and other modern common carriers; but these were obliged to seek and obtain from the state special privileges, such as the right of eminent domain, and thereby they submitted themselves to a larger measure of governmental control than exists as respects the class now under consideration. Having once devoted their property to use as a railroad, these are not permitted to withdraw it from that public use. But even as respects this class the power to legislate has been confined to statutes which benefit the public at large.

See *Mo. Pac. Ry.* v. *Nebraska*, 164 U. S. 403.

It has never been held, even as respects these modern common carriers, that any person could be legislated into a position where he might share with the owners the profits accruing from the use of their property in public service.

Returning now to the second of the classes above named—as business life became more complex and the instrumentalities used therein became more enlarged and complicated, it became necessary that there should rest somewhere the power to impress other properties and their owners with a public use and thereby impose on them this duty of serving all alike and at reasonable rates.

The courts of the country are now agreed that this power is legislative and not judicial in character.

Express Cases, 117 U. S. 29;
American Live Stock Co. v. *Live Stock Exchange*, 143 Ill. 210;
Ladd v. *S. C. P. & M. Co.*, 53 Texas 172.

Apparently the first of these statutes passed the Illinois Legislature in 1871. It undertook to fix the maximum rates of storage for the grain-mixing elevators of Chicago. That statute was attacked in this court—

Munn v. *Illinois*, 94 U. S. 113,

upon the ground that it violated the due-process-of-law clause in the fourteenth amendment of the Constitution, but this court upheld the statute as a proper exercise of the power to impress property with public use, or to regulate property, whose use by the owner had already impressed it with a public use.

Similar statutes were subsequently passed in New York and North Dakota, and these were sustained by this court on the same principle.

Budd v. *New York*, 143 U. S. 517;
Brass v. *North Dakota*, 153 U. S. 391.

Subsequently this court sustained as a proper exercise of this power a Kansas statute—which required insurance companies to charge reasonable rates—and amplified the doctrine by making the business, rather than the property used therein, the object to be impressed with a public use.

German Ins. Co. v. *Kansas*, 233 U. S. 389.

All these statutes were alike in that the benefits they conferred accrued to the public generally and not to a mere class of the public. None of them required the owners of the property or business to do more than permit all to share in the service rendered without discrimination and at reasonable rates. The foregoing is also true of the state statutes involved in the numerous state decisions reviewed by this court in *Budd* v. *New York, supra.*

Neither the inn-keeper, stage-owner, wharfinger, etc., under the common law, nor the grain elevator owner or insurance company under these statutes, was required to admit others to share in the ownership of the business or the instrumentality rendering the service or in the profit accruing to the owners therefrom. Thus in

Munn v. *Illinois*, 94 U. S. 133,

this court said:

> "There is no attempt to compel these owners to grant to the public an interest in their property, but to declare their obligations, if they use it in this particular manner."

The foregoing decisions of this court also make it clear that the power to impress property with a public use is, as respects a state, "an exercise of the police power of the state." (*Budd* v. *New York*, 143 U. S. 545). And in

Lawton v. *Steele*, 152 U. S. 133-137,

when discussing the nature and extent of the police power,

as exercised by a state statute providing for the destruction of fishing nets, this court said:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference."

It thus appears clear that in a proper case a state, in the exercise of its police power, may by statute impress some kinds of property and business with a public use.

But the general police power resides only with the states. Congress may exercise such power only so far as it is included in the other powers conferred on it by the Constitution.

> *Hamilton* v. *Kentucky Distilleries*, 251 U. S. 146;
> *United States* v. *Cruikshank*, 92 U. S. 542;
> *Tennessee* v. *Davis*, 100 U. S. 257, 302.

If Congress has also this power to impress property with a public use, it must reside in its commerce power.

Again, this power as respects any particular object must reside exclusively either in the state or in Congress; it cannot well reside in both without producing conflicting statutes.

Where the property is wholly within a state and the business, in which it is used, is mainly intrastate, the power to impress them with the public use ought, it would seem, to belong exclusively to the state, especially where, as here, Congress has no power to regulate generally.

The property of this Board is situated in Illinois and, as is elsewhere shown in this brief (p. 46), the Board transacts no business upon its property, and the business that it permits its members to transact thereon is mostly of a domestic and local, as distinguished from an interstate, character; and it seems that the power to impress

this property with a public use ought to belong to the state of Illinois alone.

Again, this section (5 (e)) is in no sense a proper exercise of the power.

This Exchange, its rules and by-laws, its exchange room and its members, should be considered jointly as constituting a local instrumentality of trade capable of rendering a service in the purchase and sale of grain, for which others are willing to pay. It is therefore not to be distinguished in character from privately owned inns, stage-coaches, etc. In all cases where the property involved is privately owned, the only interest therein that a statute may grant to the public (without paying for the property) is the right of all to share in the service it renders on fair and common terms.

This section is not for the benefit of the public generally, but only a certain class—farmers' organizations. Associations of millers, exporters, etc., are not given the right to force their members into the exchanges.

The Grain Futures Act does not undertake to compel the one thing that the common law and such statutes authorize. Its purpose is not to get for all producers of grain the right to have their grain sold on the exchange. They already have that. Nor is its purpose to better the service which the exchanges render, or to effect a change in the present rates of commission, which non-members must pay to their agents on the exchange for the sale or purchase of grain there.

There is no claim that the rates now charged are not as low as they should be, or that the service furnished by these instrumentalities is not efficient.

What The Grain Futures Act does is to force agents of farmers' organizations into membership in the exchanges, so that all farmers who join co-operative asso-

ciations may escape the payment of the commissions—which all others must pay—and thereby indirectly share in the profit which accrues from the rendering of the service—a profit which has resulted to the members of the exchanges from the creation and maintenance for many years (at private expense of money and effort) of these instrumentalities of trade.

This instrumentality or privately owned property—and the profit accruing from its use—like the grain elevator or insurance company, and the profit therefrom, belong to those who have created and own it.

Thus, in considering the application of the due-process clause to the present question, we should disregard the power to impress private property with a public use.

Any statute which takes private property for a private purpose—as well as one which takes property for a public use without the payment of adequate consideration—violates the due-process clause of the fifth and fourteenth amendments to the Constitution.

Mo. Pacific Ry. Co. v. *Nebraska*, 164 U. S. 403;
Missouri Ry. v. *Nebraska*, 217 U. S. 196;
Chi., M. & S. P. R. R. v. *Wisconsin*, 238 U. S. 491;
Eubank v. *Richmond*, 226 U. S. 137;
Cole v. *La Grange*, 113 U. S. 1.

The first of these cases has many points of similarity to the case at bar. Farmers of a certain county in Nebraska (Farmers' Alliance No. 365) had associated themselves together for the same purpose as sought by section 5 of The Grain Futures Act—to market their crops at cost—by constructing and operating a local elevator for their joint benefit. The statute of Nebraska prohibited railroads from giving any preference or advantage to, or subjecting to any prejudice or disadvantage, any person or locality, or any particular description of traffic *in any respect whatever.*

The railroad company had already leased to two private persons sites upon its rights of way for the construction of local elevators at that point, and this association of farmers claimed that the refusal of the railroad company to permit them also to construct an elevator on its right of way violated the foregoing statute, and the State Supreme Court so held. But this court held that this "was in essence and effect a taking of private property of the railroad corporation, for the private use of the petitioners," and not due process of law.

The fifth amendment applies to an intangible right as well as to tangible property.

> *Monongahela Co.* v. *United States,* 148 U. S. 312, 343;
>
> *Oklahoma* v. *Kansas Nat. Gas Co.,* 221 U. S. 229, 253.

Again, any statute which materially impairs the value or profitable use of private property is as much a taking within the due-process provision as the actual appropriation of it.

> *Peabody* v. *U. S.,* 231 U. S. 530;
> *Filor* v. *U. S.,* 9 Wall. 45, 49.

Indeed, a pecuniary loss need not be shown. If the right of property is invaded, the statute is within the constitutional provision.

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land."
>
> *Buchanan* v. *Warley,* 245 U. S. 60, 74.

A statute, therefore, which, like the one at bar, compels an unwilling owner to admit others into a right to

enter upon and use his property, violates the due-process provision, unless there is a taking for public use—in which case compensation must be made.

To apply these principles to the case at bar: This Board was by special charter created by the State of Illinois a *private* corporation with power to acquire and hold property. For more than sixty years the members of this Exchange have annually paid assessments or dues sufficient to meet the current expenses and create a large surplus, which is now represented by an exchange building in Chicago of the value (above a mortgage) of more than $2,000,000. (Rec., 5.) This property is just as much privately owned as is any office building or private residence.

It is as much a violation of the due-process clause for Congress to give outsiders entrance into this building as would be a statute compelling owners of residences to admit roomers into their homes.

This Exchange, acting under a power expressly given it by its charter, has for sixty years confined access to and use of, a part of this property—its exchange hall—to such persons, as in the exercise of their discretion its board of directors should deem to be fit persons to there make contracts with other members. *Indeed, the basic right inuring from membership in this association is the right to enter this exchange hall and there trade.*

Many efforts have been made to get the Illinois courts to interfere with, and control, the exercise of this discretion and determine who should be its members, but always without success. (*Board of Trade* v. *Nelson*, 162 Ill. 431, 438; *People* v. *Board of Trade*, 80 Ill. 134.)

In one case involving a similar exchange (*American Live Stock Co.* v. *Live Stock Exchange*, 143 Ill. 210), the Illinois Supreme Court expressly held that the courts

were without power to compel the exchange to accept any person as a member.

The reason for this attitude of the courts is that confidence in the integrity of members lies at the basis of all trading.

> *McCarthy Bros.* v. *Minneapolis Chamber of Commerce*, 105 Minn. 497, 501.

This Exchange has also thought it advisable (Rec., 4) not to permit any corporation to become a member; but it allows a corporation to make trades in its building, if *two* of its executive officers and substantial stockholders are members, and it makes these two members subject to discipline for failure of their corporation to comply with its business obligations.

By The Grain Futures Act farmers' associations may participate in the trading by having *one* representative admitted to membership.

Section 5 (e) compels this Exchange to admit to its exchange room—and the privilege of trading there with other members—*any* duly authorized representative of a co-operative farmers' association (which, of course, means that *all* such representatives must be admitted), provided only that the association—not the representative—has adequate financial responsibility. The representative need not be a fit person, if his association has sufficient financial responsibility.

Thus, the right which every exchange has—and must have in order to function properly—to admit into its exchange room and trading privileges only such persons as, in the judgment of its officials, are in point of character, business integrity and financial standing, fit persons to join in the trading, is, by this act, destroyed in favor of a certain class—farmers' organizations and their representatives.

The proper exercise of this discretion by the directors is of great importance to all trading members, because the first member to accept a bid in the "pits" gets the trade, and trades for very large amounts are made oftentimes in an excited and noisy market by mere word of mouth, and no opportunity is afforded to ascertain, before the making of the trade, the present financial responsibility of the trader. The rules requiring margins often afford inadequate protection when the markets are excited and the fluctuations are sudden and large.

Thus, the principal protection to traders is the character of the trader and the assurance—which the character of the trader only can give—that he will not go beyond his financial depth.

As respects farmers' associations, the Secretary of Agriculture is made the final judge. If the Exchange should refuse to admit a representative of such association which he—disagreeing with the directors—thinks has sufficient financial responsibility, he may direct the admission of the applicant, and if this shall be refused, he may deprive the Exchange of its designation as a "contract market."

Thus this Exchange is, by this Grain Futures Act, expressly deprived of its present charter right to say who may enter its privately owned exchange room and there enjoy the privilege of trading.

The state could—and Congress could, if this future trading were interstate commerce,—acquire, under the power of eminent domain, this exchange building, and make it a public market, to which all might resort under such restrictions as the legislative mind might see fit to impose.

This Grain Futures Act does not contemplate such a taking; nor does it seek to make these grain exchanges

public markets. For a market—to be public—must be one to which all classes of traders may resort. This act, as has been already shown, gives the right of access only to a particular class—co-operative associations of farmers.

The question here is not to be confined to the power as exercised by this act. "Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed." (*Brown* v. *State of Maryland*, 12 Wheat. 439.) If the power exists at all, it authorizes Congress to compel the admission to membership of *all* persons now pecuniarily disadvantaged by not being members, who may wish to enjoy the facilities, which the Exchange provides, for the purpose of *buying or selling* at cost.

The injurious results of such legislation should not be overlooked. This Exchange's principal source of revenue is the yearly assessment of its members, which now produces $240,000 a year. (Rec., 5.)

Hence the Exchange must make it profitable for a sufficient number of persons to become and remain members; and this can be done only by making the value of the benefit that the membership confers upon the member exceed his share of the expense of maintaining the Exchange. If the members find no profit or advantage in trading, a membership will have little—and if any, only a sentimental—value, which would not be enough to induce members to pay the large assessment necessary to meet the expense of maintaining the Exchange.

There are several ways in which an exchange makes the privilege of membership valuable enough to attract members. (Rec., 5.) It maintains an exchange hall, where the making of trades is convenient and economical. It confines trading there to those who are members, thus making it necessary for non-members to employ members

as agents, if they desire to share in the trading. But, if Congress or a state may compel the exchange to give access to the salaried agents of all those, who would otherwise employ members to make trades on a commission basis, the business of making trades for others on a commission—which comprises a substantial part of the business of the members of an exchange—will be destroyed or seriously impaired, and it would no longer be profitable for that class of members to remain members.

But it is not enough for an exchange merely to confine trading to its own members and thereby enable them to profit by acting as agents for non-members. To function properly, it is necessary that it should attract and retain members of the right character and credit.

One of the things essential to the successful maintenance of an exchange is its disciplinary power over its members. It must compel them to abide by their contracts, and otherwise maintain a high standard of business integrity. An exchange can do this only by the exercise of its disciplinary power to expel or suspend members who are guilty of uncommercial conduct, or default on their contracts. But the fear of suspension or expulsion loses much of its deterrent influence when the privilege of remaining a member becomes of little value. Hence, all exchanges have found it necessary to give value to the privileges of the membership by prescribing minimum rates of commission to be charged by members when acting as agents for others.

This the courts recognize as a legitmate function of the exchange. (*Dickinson* v. *Board of Trade*, 114 Ill. App. 295; *State* v. *Duluth Board of Trade*, 107 Minn. 506.)

To render this commission rule effective, it is necessary to prohibit—as this Board does (Rec., 6)—members

from directly or indirectly rebating to their principals any part of their commissions.

It is alleged in the bill—and admitted—that this commission rule has materially added to the value of memberships on this Board. (Rec., 6.)

This Grain Futures Act entirely nullifies this commission rule as respects these farmers' organizations. It permits the farmers of a state, or of a wider territory, to join one association, designate one of its salaried officers as its representative, have him admitted to the exchange, and by the means of the "patronage dividends" have all their grain sold there *at cost*.

Thus, the present act impairs—and the full exercise of the power claimed for Congress would completely destroy—the right of this Exchange, not only to retain sufficient members to derive the income necessary to meet its expenses, but would also impair the disciplinary power of the exchanges over their members.

It therefore seems clear that section 5 (e) of the act violates the fifth amendment of the Constitution by depriving this Exchange and its members of their property without due process of law.

Point X.

Section 6 of the act violates the due-process-of-law provision of the Constitution.

This section provides that any person who "is violating any of the provisions of this Act, or is attempting to manipulate the market price of any grain in violation of the provisions of section 5 hereof, or of any of the rules or regulations made pursuant to its requirements," shall upon the complaint of the Secretary of Agriculture be tried before a commission consisting of

such Secretary and two other cabinet officers (all of whom are appointed by, and hold office during the will of, the President), and if found guilty, the commission may punish him by depriving him of all trading privileges upon all "contract markets" "*for such period as may be specified in said order,*" which may be permanently.

As speculating in grain and acting as agent for such speculators are recognized by the law to be lawful vocations, and as the right to pursue any lawful vocation—sometimes called "the liberty of pursuit"—is a part of the liberty which the Constitution guarantees to every citizen, (*Butchers' Union* v. *Crescent City Co.*, 111 U. S. 746, 762; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *In the Matter of Jacobs*, 98 N. Y. 98), it follows that the punishment here authorized is a deprivation of liberty within the meaning of that term in the due-process clause It differs from imprisonment—not in kind, but only in degree. The latter only deprives the citizen of more of his liberty than does the former. Indeed, depriving a trader or broker permanently—or for a long period—of his right to trade in any market would in most cases cause greater pecuniary loss—and thus be more severe punishment—than the maximum fine of $10,000 which the district courts may impose under section 9 of this act.

The question thus is—whether, considering the offense created by, and the punishment provided therefor in, section 6, a trial by this commission appointed by the President, is "due process of law."

In determining this question, as stated by this court (*Murray* v. *Hoboken Co.*, 18 How. 272, 277), "We must examine the constitution itself, to see whether this process be in conflict with any of its provisions."

The provisions here pertinent are

> "Article III. Section 1. The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior * * *.
>
> Section 2. * * * The trial of all crimes, except in cases of impeachment, shall be by jury; * * *"

The sixth amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, and to be informed of the nature and cause of the accusation * * * to be confronted with the witnesses against him."

A full appreciation of the meaning of these clauses requires a background of history. Sir Henry Maine says, in his "Ancient Law," "that criminal law started as the business of the collective community to avenge its own wrong by its own hands, and ended in the doctrine that the chastisement of crimes belonged in a special manner to the sovereign as the representative of the people."

In Rome the kings—and subsequently the consuls—reserved to themselves the judgment of criminal affairs, but subsequently the Valerian law gave an appeal to the people from a decision endangering the life of a citizen.

In early England too, the administration of the criminal laws became the function of the king, who established first the *aula regia*, presided over by the great officers of the state, who attended on his person and were, of course, subject to his influence, and subsequently the Star Chamber. The former subsequently became the King's Bench. Criminal prosecutions in these courts, as Blackstone tells us, "continually harassed the sub-

ject, and shamefully enriched the crown." So great was the injustice resulting from this close association of the executive and judicial powers in criminal matters that the Great Charter "prohibited the king's inferior ministers from holding pleas of the crown, or trying any criminal charge, whereby many forfeitures might otherwise have unjustly accrued to the exchequer." (4 Blackstone 424.)

Thus the current was started in the opposite direction, and in the year 1700 the Act of Settlement provided that after the accession of the House of Hanover to the throne of England, judges' commissions should be made "*quamdiu se bene gesserint*" (during good behavior) and their salaries fixed, and that they should be removable only upon the address of both houses of Parliament.

Montesquieu, in his great work "Spirit of the Laws" (published in 1748), emphasized the fundamental principles that "in every government there are three sorts of powers," and "there is no liberty, if the judiciary power be not separated from the legislative and the executive."

When adopting its constitution in 1780, Massachusetts expressed this principle as follows:

> "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: * * *"

And the same principle found expression in the early constitutions of some of the other original states.

Thus, when the Constitutional Convention met, it found this principle of the separation of sovereign powers firmly established in the public mind, and carried it into the Federal Constitution. Hence, the provision

that all exercise of the judicial power—which includes all criminal cases, that is, proceedings to punish in the interest of the public, any violation of law—must be carried to the *courts* established by Congress and presided over by judges who are independent of both the President and Congress.

The Constitution also requires that in all criminal prosecutions the accused shall be entitled to a jury.

In annulling a conviction by a military commission, this court said, in

Ex parte Milligan, 4 Wall. 2, 119, 121, 122:

> "It is the birthright of every American citizen when charged with crime, to be tried and punished according to law. * * * Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it 'in one supreme court and such inferior courts as the Congress may from time to time ordain and establish,' and it is not pretended that the commission was a court ordained and established by Congress. * * * One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior." In

Wong Wing v. *United States*, 163 U. S. 228,

where under an act excluding Chinese labor, a Chinaman, unlawfully in this country, was arrested and brought before a commissioner of the United States court, who found him guilty and ordered his confinement in the house of correction for sixty days and his removal thereafter from the United States to China, this court, while sustaining the order of removal, held the act unconstitutional, so far as it permitted the commitment to jail.

because the crime made punishable by fine or imprisonment was not to be established by a judicial trial.

Huber v. *Reily,* 53 Pa. St. Rep. 112, 117,

in which, in considering the effects of the foregoing constitutional provisions upon an act of Congress forfeiting the rights of citizenship of a deserter during the civil war, where one registered as a deserter had tendered his ballot to a judge of election who refused to receive it, the court said:

> "The spirit of these constitutional provisions is briefly that no person can be made to suffer for a criminal offense unless the penalty be inflicted by due process of law. * * * It ordinarily implies and includes a complainant, a defendant and a judge, regular allegations, opportunity to answer and a trial according to some settled course of judicial proceeding. * * * I can call to mind no instance in which it has been held that the ascertainment of guilt of a public offense and the imposition of legal penalties, can be in any other mode than by trial according to the law of the land or due process of law, that is, the law of the particular case, administered by a judicial tribunal authorized to adjudicate upon it. And I cannot persuade myself that a judge of elections or a board of election officers constituted under state laws is such a tribunal."

See also *Ex parte Randolph,* Federal Cases No. 11,558, where Chief Justice Marshall held an act of Congress providing for the issue of warrants committing to jail naval officers who were short in their accounts until such shortage was paid, was unconstitutional where the shortage was disputed.

Story on Constitution, Sec. 1946, says that "When life and liberty are in question, there must in every instance be judicial proceedings." See also

Ong Chang Wing v. *U. S.,* 218 U. S. 272, 279;
Kilbourn v. *Thompson,* 103 U. S. 168;
State v. *Ryan,* 70 Wis. 676;

Parsons v. *Russell*, 11 Mich. 113, 121;
Addison v. *State*, 126 Pac. Rep. 840.

A crime is an offense against a public law and comprehends all offenses. (1 Chitty Cr. Pr. 14.)

A crime is a "wrong which the government notices as injurious to the public and punishes in what is called a 'criminal proceeding' in its own name." (1 Bishop Cr. Law, Sec. 32.)

In deciding whether a judgment in contempt proceedings is reviewable as a criminal case, this court has held, that, if the order compelled the unconditional payment of a fine to the Government, and was not one payable to the beneficiary of the order, or committing the defendant to jail until the order has been complied with, it "is criminal in its nature, in that the party is charged with doing something forbidden, and, if found guilty, is punished."
Bessette v. *W. B. Conkey Co.*, 194 U. S. 324.

Within these definitions, attempts to manipulate, or other violation of The Grain Futures Act, clearly constitutes crimes, which are punished solely in the interest of the general public. By depriving the violator of a part of his liberty it penalizes him for a wrong done to the public.

In this particular it is no less a criminal statute because, instead of compelling the wrong-doer to pay a money penalty or sending him to jail, it deprives him of his constitutional right to earn a living by trading on an exchange.

Section 6 authorizes the commission to punish one "violating any of the provisions of the act." Section 9 of the act declares a like violation a misdemeanor and punishable by a fine not exceeding $10,000, or imprisonment not exceeding a year, or both. Section 9 contemplates a conviction in a criminal prosecution in the

District Court. If violating any of the provisions of the act is a crime under section 9 it cannot be less so under section 6. By declaring in one section that the forbidden act is a misdemeanor and not doing so in another section, Congress cannot make the same act at once a crime and not a crime within the Constitution.

Again, if section 6, so far as it penalizes the violation of "any of the provisions of this Act," is subject to these constitutional restrictions, so must also be that provision of section 6, which authorizes the commission to punish for "attempting to manipulate the market price of any grain." The same punishment being prescribed for both acts, one cannot be—while the other is not—a criminal offense.

There are, it is true, certain "petty offenses" which are not within the constitutional provisions above mentioned. Thus, the Oleomargarine Act, by imposing a fine of $50 did not provide for a "criminal prosecution" entitling the defendant under the Constitution to a jury trial. (*Schick* v. *United States*, 195 U. S. 65.)

The Customs Administration Act, which authorizes the collector of the port to impose and collect additional duty where the importer has undervalued is held not to violate the Constitution. (*Passavant* v. *U. S.*, 148 U. S. 214; *Origet* v. *Hedden*, 155 U. S. 228.)

So an act of Congress authorizing an executive officer to impose a fine of $100 upon every vessel owner bringing in an alien afflicted with a loathsome disease, and to refuse clearance papers until such fine is paid, is held not to define and punish a criminal offense, or to be the assertion of judicial power, either civil or criminal, but to merely entail the infliction of a penalty enforceable by a purely administrative action. (*Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320.)

But the conduct made punishable by section 6 is not such a petty offense.

Callan v. *Wilson*, 127 U. S. 540,

where the conspiring to prevent another from pursuing a lawful vocation, for which one was fined $25 and upon default of payment was to suffer imprisonment for thirty days, was held not a petty offense. To ascertain whether a proceeding of a criminal nature is "due process" resort should be had to the common law of England (*Murray* v. *Hoboken Co.*, 18 How. 277); and under that law "all unlawful endeavors to enhance the price," such as forestalling, engrossing and regrating were crimes, indictable and triable in courts possessing criminal jurisdiction. (4 Bacon's Abridgement, 335; *King* v. *Waddington*, 1 East 167; 4 Blackstone, 158; 2 Russell on Crimes, 1919.)

Surely no statute which permits by way of punishment one to be deprived of a part of his liberty "for such period as may be specified in the order" of the trial court, can be, within the letter or spirit of the Constitution, a mere petty offense.

Nor can Congress escape these constitutional provisions designed to protect the citizens against unjust criminal prosecution by adopting an unusual method of punishment. It is the nature, extent and effect—but not the particular kind—of the prescribed punishment, which must determine the character of the offense.

Nor are these constitutional objections obviated because section 6 permits a review of the orders of the commission by Circuit Courts of Appeals. The act creating these courts confers on them only appellate jurisdiction, except in bankruptcy, where a supervisory jurisdiction is also conferred. The Grain Futures Act does not attempt to confer on them any *original* jurisdiction. Their only jurisdiction is, upon the evidence taken by the

commission, "to affirm, to set aside, or to modify the order of the commission," and the findings of the commission as to the facts, if supported by the weight of evidence, are made conclusive. There is in those courts no trial *de novo*. The accused is not there confronted by the witnesses against him, as contemplated by the sixth amendment, which also includes the presence of the witnesses in the tribunal trying the offense. Nor is there in those courts any trial by jury. Surely the foregoing constitutional provisions are not met by merely giving the accused an *appeal* from a tribunal not sanctioned by the Constitution to an appellate court not authorized to grant the accused the protection which the Constitution assures him.

Is it not then clear that section 6 of The Grain Futures Act offends against the Constitution by creating and punishing an offense against the public of a character to be a crime, and by providing for a trial of such offense by a commission consisting of those holding office at the will of the President, instead of by a court possessing judicial power and presided over by judges holding office during good behavior and a jury?

The due-process provision and that part of the sixth amendment which requires that the accused shall enjoy the right "to be informed of the nature and cause of the accusation," is also violated by section 6. This section penalizes any person "attempting to manipulate the market price." What is manipulation is nowhere in the act defined. All that a trader can do in these future markets is to buy or sell. Manipulation, therefore, on the short side of the market must consist in excessive selling. But the act does not attempt to declare beyond what quantity selling becomes an attempt to manipulate. This is left to the commission which the act creates to try the offender.

But Congress alone has power to define crimes against the United States, as this court decided in

United States v. *Cohen Grocery Co.*, 255 U. S. 81, where it held unconstitutional that part of the Lever Act which sought to punish any person who wilfully made any "unjust or unreasonable rate or charge," or exacted "excessive prices for any necessaries."

True, section 6 penalizes any attempt to manipulate in violation "of any of the rules or regulations made" pursuant to the requirements of the act—that is, by the Secretary of Agriculture. But this only makes the vice of the provision the more pronounced; for Congress may not under the Constitution delegate to an appointee of the President power to declare what shall constitute a criminal offense.

Section 6 also violates the Constitution in not being confined to such attempts to manipulate as prejudicially affect *interstate* commerce. (*Trade-Mark Cases*, 100 U. S. 82.)

But it may be asked, as under laws exacting licenses administrative officers are sometimes authorized to revoke them, why may not this commission do in effect the same thing?

But the right to revoke the license only exists where there is the right to issue it. As a method of collecting taxes, licenses are often exacted from all, because all must pay taxes. Here the license is not revoked, but one is punished for not having one.

But to the right to require licenses as a means of regulating conduct there are limitations. The power to thus regulate must exist. The government must have power to perform the particular function, of which the license is the instrument. So where the conduct of a business is not a matter of right, the right to revoke is one of the

express or implied conditions, to which the licensee consents. (*Schwuchow* v. *City of Chicago*, 68 Ill. 444.) Licenses to sell liquor, for instance, "are merely temporary permits to do what otherwise would be an offense against a general law." (*Metropolitan Board* v. *Barrie*, 34 N. Y. 657, 667.) In the same class are licenses to doctors, lawyers, pilots, etc. The possession of requisite skill is there essential to the public welfare. No one has the inherent right to follow such a calling.

When one has, under the Constitution as a part of his liberty, the right to do an act or pursue a calling, a license may not be required from him as a condition of doing so. (2 Cooley on Taxation, 1137.) Thus a license may not be exacted as a condition of the right to use for travel a public thoroughfare (*City of Chicago* v. *Collins*, 175 Ill. 445); nor as a prerequisite to the pursuit of the vocation of a blacksmith. (*Bessette* v. *People*, 193 Ill. 334.) Nor to be a partner with a plumber. (*Schnaier* v. *Navarre Hotel Co.*, 182 N. Y. 83.) (See also *Royall* v. *Virginia*, 116 U. S. 572.)

The right of a state to exact a license as a means of regulation is a part of the police power (*Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 374), and is subject to its limitations.

While Congress may regulate interstate commerce by means of licenses, the power to so regulate internal or domestic commerce belongs exclusively to the states. (*License Tax Cases*, 5 Wall. 462, 470.)

It is hardly conceivable that the Constitution, in conferring interstate-commerce power on Congress, intended to authorize it to exact licenses from every person engaged in making intrastate contracts for future delivery and make them revocable by an executive officer as a means of preventing some from obstructing interstate

commerce. The State of Illinois could not exact a license from every person desiring to make a contract for the future delivery of grain within the state. No more could Congress.

But we need not pursue this question any further, because Congress has not undertaken in The Grain Futures Act to exercise the power to license those engaged in this intrastate future trading.

It is therefore submitted that section 6 of the act, so far as it confers on this commission jurisdiction to try persons for overtrading, and to punish them by depriving them of the right to resort to the exchanges, is unconstitutional.

This question directly arises on this appeal; for the suit is not merely one by the Board of Trade, but also by seven members of the Board (suing on behalf of all of them) to restrain a public official (the Secretary of Agriculture) from enforcing—as prosecutor—what is a criminal provision—it being, as the bill alleges, his purpose to enforce it.

XI.

WHAT THE PRICE-CHARTS SHOW.

When there is a preconceived purpose to do something, there is naturally among legislators, as well as others, a disinclination to come in close contact with troublesome facts. This perhaps will account for the fact that, before characterizing the prices in this future trading as "sudden or unreasonable" and the result of manipulation, the committees of Congress did not take the trouble to ascertain what these fluctuations had been.

These charts supply that information. They show "cash" prices, except where on the eighty-one years chart the light lines indicate also future prices.

The World's War started late in July, 1914. This country declared war on April 6, 1917, but Congress did not pass the Wheat Control Act until August 25, 1917, when future trading ceased. That control ended on June 1, 1920, but future trading was not resumed until July 15, 1920. During such control, the Government during part of the time fixed both maximum and minimum prices (when there were no fluctuations) and at other times fixed only a minimum price, which permitted violent fluctuations. When the Government released its control, there was necessarily a rapid deflation and a quick drop to the lower level of prices determined by world conditions, as has been the case after every great war. These Post-War conditions have been since July, 1920, so abnormal that wider fluctuations than usual were inevitable. After the World's War started in 1914, and especially after our entry into the war, the wheat market was a wild one because of the insistent buying of wheat in this country by the Allies. During this period, as the charts show, the fluctuations were very violent and even greatest during Government control and when future trading was suspended.

Therefore, it follows that these charts are mainly instructive—as respects the questions in this case—because they show the course of prices prior to July, 1914.

The deductions from these charts are:

1. That there have been no corners in wheat at Chicago since 1898, thus confirming the statements of Senator Capper and Professor Emery that corners are a thing of the past. (See pages 21, 22, of this brief.) During the period of future trading, a corner is indicated by a high price on the last few days of the month followed by a sudden decline to a lower level on the first day of the succeeding month. When there is a corner in

the future price, the cash price in the same market in evitably follows the future price.

2. That corners in wheat in Chicago were more fre quent before future trading on the exchanges became practice.

3. That fluctuations in prices of wheat (during peac times) were much more sudden and violent before futur trading was adopted than they have been since, thus con firming the views of the Political Economists—whom w have quoted (pp. 29-35)—that future trading has mad fluctuations less sudden and less violent.

4. That in many of the years of future trading th prices in the fall were higher relatively (that is, whe the carrying charges are considered) than they were i the following spring, and that during all the period of fu ture trading "orderly marketing" has prevailed—b which we mean that the differences between the sprin and fall prices have been only reasonable ones—thus con firming other like evidence mentioned on page 30 of thi brief and disproving the charge of Senator Capper tha the speculators deliberately depress prices in the fall t mulct the farmer.

5. The Chicago and New York prices are at time (see five-year chart) absolutely, and at other times rela tively, higher than Liverpool (the transportation charge are more than ten cents a bushel), thus showing that th speculators, instead of depressing, hold up prices throug their unwillingness to sell at the prices offered by th Liverpool buyers.

6. The Chicago prices are often (see five-year chart higher than the New York prices—sometimes absolutely and at other times relatively, when the transportatio cost is considered. This shows that Chicago speculator instead of depressing, are maintaining prices as agains New York buyers.

7. There are at times pronounced variances in relative prices in the different markets (see five-year chart) which tends to prove that no single factor—such as excessive short-selling in a single market—materially affects prices in other markets. Thus the Minneapolis prices are at times higher than in the other markets, even including Liverpool, especially during the months of June, July and August, which is the end of the spring wheat crop year—Minneapolis being principally a spring wheat market. This indicates either a short crop of *spring* wheat or that the millers of that territory have allowed too much of the available supply to be shipped east. It is to be here borne in mind that Minneapolis is a very large milling center. So, too, the cash prices in Kansas City are at times higher than in other markets (sometimes including Liverpool). This indicates either a short crop of winter wheat (Kansas City being in the winter wheat country) or that the millers in the Missouri River district were slow in making their purchases.

8. That these Minneapolis prices are not as a rule higher at the same times that the Kansas City prices are higher than other markets, which negatives the theory that cash prices follow future trading in Chicago. Otherwise, we should have higher prices in both places during the same time, and Chicago prices should be relatively higher.

9. The cash prices are often above the future prices, and at other times are nearer the future prices than the cost of carrying the grain from the present to the future delivery time, which shows that cash prices are not fixed by future prices; but these variations are to be accounted for by temporary shortage of the actual grain or other trade conditions.

The cash price and the price for wheat deliverable during the current month will draw together,

because sellers for delivery during that month will buy to deliver whenever it is more profitable than to close their sales by counter purchases.

10. That during the 43 years of future trading (1871-1913) the average Chicago price of wheat has been more than fifteen cents a bushel higher than it was for the twenty years immediately before the Civil War, when there was no future trading.

It is, therefore, respectfully submitted that this cause should be remanded for a decree in favor of appellants, unless a hearing upon evidence is deemed necessary, in which event a temporary injunction should be ordered.

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Counsel for Appellants.

An Act For the prevention and removal of obstructions and burdens upon interstate commerce in grain, by regulating transactions on grain future exchanges, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, This Act shall be known by the short title of "The Grain Futures Act."

SEC. 2 (a) For the purposes of this Act "contract of sale" shall be held to include sales, agreements of sale, and agreements to sell. The word "person" shall be construed to import the plural or singular, and shall include individuals, associations, partnerships, corporations, and trusts. The word "grain" shall be construed to mean wheat, corn, oats, barley, rye, flax and sorghum. The term "future delivery," as used herein, shall not include any sale of cash grain for deferred shipment or delivery. The words "board of trade" shall be held to include and mean any exchange or association, whether incorporated or unincorporated, of persons who shall be engaged in the business of buying or selling grain or receiving the same for sale on consignment. The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person. The words "interstate commerce" shall be construed to mean commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside there-

of, or within any Territory or possession, or the District of Columbia.

(b) For the purposes of this Act (but not in any wise limiting the foregoing definition of interstate commerce) a transaction in respect to any article shall be considered to be in interstate commerce if such article is part of that current of commerce usual in the grain trade whereby grain and grain products and by-products thereof are sent from one State with the expectation that they will end their transit, after purchase, in another, including in addition to cases within the above general description all cases where purchase or sale is either for shipment to another State, or for manufacture within the State and the shipment outside the State of the products resulting from such manufacture. Articles normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereof from the provisions of this Act. For the purpose of this paragraph the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nation.

SEC. 3. Transactions in grain involving the sale thereof for future delivery as commonly conducted on boards of trade and known as "futures" are affected with a national public interest; that such transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling grain and the products and by-products thereof in interstate commerce; that the prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of grain and the products and by-products thereof and to facilitate the movements thereof in interstate

commerce; that such transactions are utilized by shippers, dealers, millers, and others engaged in handling grain and the products and by-products thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price; that the transactions and prices of grain on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling grain and products and by-products thereof in interstate commerce, and that such fluctuations in prices are an obstruction to and a burden upon interstate commerce in grain and the products and by-products thereof and render regulation imperative for the protection of such commerce and the national public interest therein.

SEC. 4. It shall be unlawful for any person to deliver for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication any offer to make or execute, or any confirmation of the execution of, or any quotation or report of the price of, any contract of sale of grain for future delivery on or subject to the rules of any board of trade in the United States, or for any person to make or execute such contract of sale, which is or may be used for (a) hedging any transaction in interstate commerce in grain or the products or by-products thereof, or (b) determining the price basis of any such transaction in interstate commerce, or (c) delivering grain sold, shipped, or received in interstate commerce for the fulfillment thereof, except—

(a) Where the seller is at the time of the making of such contract the owner of the actual physical property covered thereby, or is the grower thereof, or in case either

party to the contract is the owner or renter of land on which the same is to be grown, or is an association of such owners, or growers of grain, or of such owners or renters of land; or

(b) Where such contract is made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a "contract market," as hereinafter provided, and if such contract is evidenced by a record in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery: *Provided*, That each board member shall keep such record for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, which record shall at all times be open to the inspection of any representative of the United States Department of Agriculture or the United States Department of Justice.

SEC. 5. The Secretary of Agriculture is hereby authorized and directed to designate any board of trade as a "contract market" when, and only when, such board of trade complies with and carries out the following conditions and requirements:

(a) When located at a terminal market where cash grain of the kind specified in the contracts of sale of grain for future delivery to be executed on such board is sold in sufficient volumes and under such conditions as fairly to reflect the general value of the grain and the differences in value between the various grades of such grain, and where there is available to such board of trade official inspection service approved by the Secretary of Agriculture for the purpose.

(b) When the governing board thereof provides for the making and filing by the board or any member thereof, as the Secretary of Agriculture may direct, of reports

in accordance with the rules and regulations, and in such manner and form and at such times as may be prescribed by the Secretary of Agriculture, showing the details and terms of all transactions entered into by the board, or the members thereof, either in cash transactions consummated at, on, or in a board of trade, or transactions for future delivery, and when such governing board provides, in accordance with such rules and regulations, for the keeping of a record by the board or the members of the board of trade, as the Secretary of Agriculture may direct, showing the details and terms of all cash and future transactions entered into by them, consummated at, on, or in a board of trade, such record to be in permanent form, showing the parties to all such transactions, including the persons for whom made, any assignments or transfers thereof, with the parties thereto, and the manner in which said transactions are fulfilled, discharged, or terminated. Such record shall be required to be kept for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, and shall at all times be open to the inspection of any representative of the United States Department of Agriculture or United States Department of Justice.

(c) When the governing board thereof provides for the prevention of dissemination by the board or any member thereof, of false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of grain in interstate commerce.

(d) When the governing board thereof provides for the prevention of manipulation of prices or the cornering of any grain by the dealers or operators upon such board.

(e) When the governing board thereof does not exclude from membership in, and all privileges on, such

board of trade, any duly authorized representative of any lawfully formed and conducted co-operative association of producers having adequate financial responsibility which is engaged in cash grain business, if such association has complied, and agrees to comply, with such terms and conditions as are or may be imposed lawfully on other members of such board: *Provided*, That no rule of a contract market shall forbid or be construed to forbid the return on a patronage basis by such cooperative association to its bona fide members of moneys collected in excess of the expense of conducting the business of such association.

(f) When the governing board provides for making effective the final orders or decisions entered pursuant to the provisions of paragraph (b) of section 6 of this Act.

SEC. 6. Any board of trade desiring to be designated a "contract market" shall make application to the Secretary of Agriculture for such designation and accompany the same with a showing that it complies with the above conditions, and with a sufficient assurance that it will continue to comply with the above requirements.

(a) A commission composed of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a "contract market" upon a showing that such board of trade has failed or is failing to comply with any of the above requirements or is not enforcing its rules of government made a condition of its designation as set forth in section 5. Such suspension or revocation shall only be after a notice to the officers of the board of trade affected and upon a hearing: *Provided*, That such suspension or revocation shall be final and conclusive unless within fifteen days after such suspension or revocation by the said commission such board of trade appeals to

the circuit court of appeals for the circuit in which it has its principal place of business by filing with the clerk of such court a written petition praying that the order of the said commission be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such board of trade will pay the costs of the proceedings if the court so directs. The clerk of the court in which such a petition is filed shall immediately cause a copy thereof to be delivered to the Secretary of Agriculture, chairman of said commission, or any member thereof, and the said commission shall forthwith prepare, certify, and file in the court a full and accurate transcript of the record in such proceedings, including the notice to the board of trade, a copy of the charges, the evidence, and the report and order. The testimony and evidence taken or submitted before the said commission duly certified and filed as aforesaid as a part of the record shall be considered by the court as the evidence in the case. The proceedings in such cases in the circuit court of appeals shall be made a preferred cause and shall be expedited in every way. Such a court may affirm or set aside the order of the said commission or may direct it to modify its order. No such order of the said commission shall be modified or set aside by the circuit court of appeals unless it is shown by the board of trade that the order is unsupported by the weight of the evidence or was issued without due notice and a reasonable opportunity having been afforded to such board of trade for a hearing, or infringes the Constitution of the United States, or is beyond the jurisdiction of said commission: *Provided, further*, That if the Secretary of Agriculture shall refuse to designate as a contract market any board of trade that has made application therefor, then such board of trade may appeal from such refusal to the commission described

therein, consisting of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General of the United States, with the right to appeal as provided for in other cases in this section, the decision on such appeal to be final and binding on all parties interested.

(b) If the Secretary of Agriculture has reason to believe that any person is violating any of the provisions of this Act, or is attempting to manipulate the market price of any grain in violation of the provisions of section 5 hereof, or of any of the rules or regulations made pursuant to its requirements, he may serve upon such person a complaint stating his charge in that respect, to which complaint shall be attached or contained therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made directing that all contract markets until further notice of the said commission refuse all trading privileges thereto to such person. Said hearing may be held in Washington, District of Columbia, or elsewhere, before the said commission, or before a referee designated by the Secretary of Agriculture, who shall cause all evidence to be reduced to writing and forthwith transmit the same to the Secretary of Agriculture as chairman of the said commission. That for the purpose of securing effective enforcement of the provisions of this Act the provisions, including penalties, of section 12 of the Interstate Commerce Act, as amended, relating to the attendance and testimony of witnesses, the production of documentary evidence, and the immunity of witnesses, are made applicable to the power, jurisdiction, and authority of the Secretary of Agriculture, the said commission, or said referee in proceedings under this Act, and to persons subject to its provisions. Upon evidence received the said commission may require all contract markets to refuse such person

all trading privileges thereon for such period as may be specified in said order. Notice of such order shall be sent forthwith by registered mail or delivered to the offending person and to the governing boards of said contract markets. After the issuance of the order by the commission, as aforesaid, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States circuit court of appeals of the circuit in which the petitioner is doing business a written petition praying that the order of the commisison be set aside. A copy of such petition shall be forthwith served upon the commission by delivering such copy to its chairman or to any member thereof, and thereupon the commission shall forthwith certify and file in the court a transcript of the record theretofore made, including evidence received. Upon the filing of the transcript the court shall have jurisdiction to affirm, to set aside, or modify the order of the commission, and the findings of the commisison as to the facts, if supported by the weight of evidence, shall in like manner be conclusive. In proceedings under paragraphs (a) and (b) the judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.

SEC. 7. Any board of trade that has been designated a contract market in the manner herein provided may have such designation vacated and set aside by giving notice in writing to the Secretary of Agriculture requesting that its designation as a contract market be vacated, which notice shall be served at least ninety days prior to the date named therein as the date when the vacation of designation shall take effect. Upon receipt of such notice the Secretary of Agriculture shall forthwith order the vacation of the designation of such board of trade as a

contract market, effective upon the day named in the notice, and shall forthwith send a copy of the notice and his order to all other contract markets. From and after the date upon which the vacation became effective the said board of trade can thereafter be designated again a contract market by making application to the Secretary of Agriculture in the manner herein provided for an original application.

SEC. 8. For the efficient execution of the provisions of this Act, and in order to provide information for the use of Congress, the Secretary of Agriculture may make such investigations as he may deem necessary to ascertain the facts regarding the operations of boards of trade, whether prior or subsequent to the enactment of this Act, and may publish from time to time, in his discretion, the result of such investigation and such statistical information gathered therefrom as he may deem of interest to the public, except data and information which would separately disclose the business transactions of any person and trade secrets or names of customers: *Provided*, That nothing in this section shall be construed to prohibit the Secretary of Agriculture from making or issuing such reports as he may deem necessary relative to the conduct of any board of trade or of the transactions of any person found guilty of violating the provisions of this Act under the proceedings prescribed in section 6 of this Act: *Provided further*, That the Secretary of Agriculture in any report may include the facts as to any actual transaction. The Secretary of Agriculture, upon his own initiative or in cooperation with existing governmental agencies, shall investigate marketing conditions of grain and grain products and by-products, including supply and demand for these commodities, cost to the consumer, and handling and transportation charges. He shall likewise compile and furnish to producers, consumers, and distributors, by

means of regular or special reports, or by such methods as he may deem most effective, information respecting the grain markets, together with information on supply, demand, prices, and other conditions in this and other countries that affect the markets.

SEC. 9. Any person who shall violate the provisions of section 4 of this Act, or who shall fail to evidence any contract mentioned in said section by a record in writing as therein required, or who shall knowingly or carelessly deliver for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of grain in interstate commerce, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution.

SEC. 10. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.

SEC. 11. No fine or imprisonment shall be imposed for any violation of this Act occurring before the first day of the second month following its passage.

SEC. 12. The Secretary of Agriculture may cooperate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency, or political subdivision thereof, or any person; and shall have the power to appoint, remove, and fix the compensation of such officers and employes, not in conflict with existing law, and make such expenditures for rent outside the District of Columbia, printing, telegrams,

telephones, law books, books of reference, periodicals furniture, stationery, office equipment, travel, and other supplies and expenses as shall be necessary to the administration of this Act in the District of Columbia and elsewhere, and there are hereby authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated, such sums as may be necessary for such purposes.